United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

33

BRIEF AND APPENDIX FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10007

ROBERT D. ELDER, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

No. 10008

GREENE CHANDLER FURMAN, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

H. G. MORISON,
Assistant Attorney General.
GEORGE MORRIS FAY,
United States Attorney.
EDWARD H. HICKEY,
Special Assistant to the Attorney General.

Of counsel:
EUGENE T. MAHER,
Attorney, Department of Justice.

United States Court of Appeals
for the District of Columbia
Circuit
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BRIEF AND APPENDIX FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In September 1942, appellants, honorably discharged veterans of wartime service in the United States Army, took and passed the Federal Civil Service Legal Examination, and their names were placed on the Civil Service register of attorney eligibles (R. 3, 77). Pursuant to authorization of the Legal Examining Section of the Civil Service Commission, appellants entered federal service as war service appointees to the positions of associate attorneys (Grade P–3) in the Office of the Solicitor, Department of Agriculture, on August 1, 1943, and July 26, 1943, respectively (R. 3, 77). Under the provisions of Section 17.1 (g) of the Regulations of the Board of Legal Examiners, their appointments were limited to the duration of the war and six months thereafter (R. 41–42, 84–85).

On May 1, 1947, appellants were notified that their appointments had been converted from war service appointments to appointments under the authority of Schedule A of the Civil Service Rules, with an identical war service tenure limitation (R. 43, 84–85). Thereafter, on May 29, 1947, they were notified that, as a result of a reduction in force, they would be separated from the service, effective June 30, 1947 (R. 39, 84–85). Certain nonveterans with permanent civil service status were not affected by this reduction in force.

Appellants appealed from this action to the Civil Service Commission under the authority of Section 14 of the Veterans Preference Act of 1944, 5 U. S. C. Sec 863 (R. 33–34, 84–85). The Commission, finding that the Secretary of Agriculture, in separating appellants, had acted in conformity with the provisions of that Act and Civil Service Regulations issued pursuant thereto, by decision dated July 17, 1947, affirmed the action taken and accordingly denied appellants' appeals (R. 33–35, 84–85).

While the appeals were pending, appellants on June 5, 1947, filed these actions for a declaratory judgment as to their permanent civil service status, and, alleging that their separations were illegal, sought a mandatory injunction directing their restoration to their positions.

Some months after the dismissal of appellants and all other employees with equal retention preference in this reduction in force, the Secretary of Agriculture, funds having become available by virtue of the transfer to the Office of the Solicitor of funds theretofore allotted to other agencies of the Department, and because of resignations and transfers of other personnel, recruited several attorneys. The first of these was appointed on October 27, 1947. In all, a total of nine attorneys were so employed or reemployed by appellee, one of whom was a veteran (R. 69–73). By amended and supplemental complaints, appellants further alleged this action of appellee to have been a violation of their rights (R. 49–66, 84–85).

On March 22, 1948, appellee filed a motion to strike certain matter from appellants amended and supplemental complaints and for summary judgment (R. 66), which was argued before Judge Letts. By informal memorandum filed June 2, 1947,

the Court found that appellants, as war service appointees, had been separated in full compliance with applicable statutes and regulations, and that appellees motion for summary judgment would accordingly be granted (R. 72). By order dated June 11, 1948, appellants motion for a rehearing on the ground that the Court's decision was not in accord with the decision of the Supreme Court in *Hilton* v. *Sullivan,* 334 U. S. 323, decided June 1, 1948, was denied (R. 73–74). On June 22, 1948, the order granting appellee's motion for summary judgment, from which these appeals have been taken, was entered (R. 74–75).

STATUTES, EXECUTIVE ORDERS, AND REGULATIONS INVOLVED

The applicable provision of Section 4 of the Act of August 23, 1912, and the Veterans Preference Act of 1944 are contained in the appendix to appellant's brief.

The relevant provisions of the Regulations of the Civil Service Commission are set forth in the appendix hereto, following page 19.

SUMMARY OF ARGUMENT

I

The separation of appellants, having been affirmed by the Civil Service Commission, will not be reviewed by the Court. The action of the Secretary of Agriculture in separating appellants falls within the rule restraining judicial interference with executive personnel administration. The fact that appellants are veterans who are entitled to, and who have been accorded the preferences and rights granted by the Veteran's Preference Act of 1944 does not restrict the operation of this rule. Rather, since that statute establishes an administrative remedy, these cases are specially appropriate for the application of the rule. The record discloses that appellants, war service employees, were properly classified under the applicable regulations establishing veterans preference in reductions in force, and, as so classified, they were separated in due course in a reduction in force. The record further discloses that they invoked the administrative remedy provided by Section 14 of the Veterans Preference Act of 1944 by appealing to the

Civil Service Commission, and that the Commission determined that they had been separated in full compliance with applicable statutes and regulations and accordingly dismissed their appeals. Upon this showing, the limit of judicial inquiry is reached, and this Court should affirm the judgments of the District Court.

II

Assuming the Court will review the separation of appellants, it was a valid exercise of authority conferred by law and regulations. Appellants, as war service appointees, were appropriately classified under the Civil Service Commission regulations providing retention preference for reductions in force. The Commission's reduction in force regulations are valid under the provisions of Section 12 of the Veterans Preference Act of 1944, *Hilton* v. *Sullivan,* 83 App. D. C. —, 165 F. (2d) 251; aff'd., 334 U. S. 323. Nor could appellants' rights be any different or greater under Section 4 of the Act of August 23, 1912, since that statute, in terms, and by executive orders and regulations, established an absolute preference only for veterans with permanent classified civil service status. The record further discloses that all the procedural rights secured to appellants by the terms of Section 14 of the Veterans Preference Act of 1944 were accorded to them.

ARGUMENT

Preliminary analysis

Prior to the enactment Ramspeck-Mead Act, November 26, 1940, 5 U. S. C., Sec. 631a (54 Stat. 1211), attorney positions were excepted from the classified civil service. By virtue of this Act, the President issued Executive Order 8743, 6 Fed. Reg. 2117, 3 C. F. R. Cum. Supp. 927, effective January 1, 1942, placing certain attorney positions within the classified civil service and making them subject to the Civil Service Act and Rules.

Under the Regulations of the Commission issued pursuant to Executive Order 8743, incumbents of attorney positions and appointees thereto secured status in the classified service by qualification under the provisions of the Act, Executive Order 8743, and the appropriate Civil Service Commission Rules and Regulations.

With the advent of the war and the consequent need to expedite Federal employment during the emergency, and in order to avoid injustice to those who, because of the war, were unable to compete for civil service positions, the President, on February 16, 1942, by Executive Order 9063, 7 Fed. Reg. 1075, 3 C. F. R. Cum. Supp. 1091, authorized and directed the Civil Service Commission to adopt and prescribe special regulations governing the recruitment, placement, and status of all personnel in all of the executive departments and agencies of the Federal government for the duration of the war emergency. The Commission thereupon issued its War Service Regulations, 7 Fed Reg. 7723, 5 C. F. R. Cum. Supp. Secs. 18.1 *et seq.* pp. 1459 *et seq.*, effective March 16, 1942. At the same time, the Regulations of the Board of Legal Examiners, the organization within the Commission established to govern the recruitment, selection, appointment, promotion, and transfer of attorneys in the classified civil service were amended to conform substantially to the War Service Regulations of the Commission, 5 C. F. R. Cum. Supp., Sec. 17.1 (g), p. 1457.

In the main, the regulations of the Board of Legal Examiners provided that all appointments to attorney positions after their effective date would be for the period of the war and six months thereafter unless limited to a shorter period (Sec. 17.1 (g) *supra*). It was further provided that attorneys so appointed would not thereby secure status in the classified civil service. Upon the authority of these regulations, appellants received war service appointments as attorneys in July and August, 1943, respectively (R. 41–42, 84).

On February 4, 1946, the President issued Executive Order No. 9691 (11 Fed. Reg. 1381) providing for the termination of the War Service Regulations and authorizing the Civil Service Commission to issue temporary regulations to cover the transitional period between the expiration of the War Service Regulations and the issuance of revised Civil Service regulations. Temporary Civil Service Regulations were issued by the Civil Service Commission pursuant to the authority of the aforesaid Executive Order, effective March 7, 1946, said Temporary Civil Service Regulations superseding the War Service Regulations. The temporary regulations did not require or re-

sult in any change in the nature of the appointments held by the appellants or in the tenure thereof.

There existed then prior to May 1, 1947, three possible categories in which attorney appointees were classified: (1) attorneys with competitive status; (2) war service appointments which were effected under the War Service Regulations, for the most part those appointed on or after March 16, 1942 and who did not enjoy permanent status in any prior Federal employment; and (3) attorneys serving under temporary indefinite appointments under the temporary Civil Service Regulations which were in effect from March 6, 1946 to April 30, 1947.

Effective May 1, 1947, the President issued Executive Order 9830 (12 Fed. Reg. 1259) promulgating revised Civil Service Rules which specifically provided among other things, that all attorney positions in the entire executive civil service would be excepted from the competitive service and included in Schedule A of the Civil Service Rules (Rule VI, 12 Fed. Reg. 1263).

By virtue of these revised Rules, by Departmental Circular No. 497, Supp. No. 2 (Appellee's App. 34), the Commission withdrew, effective May 1, 1947, the authority of executive agencies to continue the employment of attorneys under war service regulations, and authorized conversion of the appointments of such attorneys to appointments under the authority of Schedule A of the Rules. The appointments of appellants were so converted, with war service tenure limitations (R. 43, 84–85).

Turning now to the procedure to be followed in reductions in force, we find that section 12 of the Veterans Preference Act of 1944, 5 U. S. C., Sec. 861 (58 Stat. 390), authorized the Civil Service Commission to promulgate regulations governing reductions in personnel, "which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings." It further provides that "preference employees whose efficiency ratings are "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: * * *" Under this statute, and executive Order 9830, *supra,* the Commisison issued revised Reduction in Force Regulations, effective May 1, 1947, which provided in general for the division of civilian govern-

ment employees into the following three retention groups according to their tenure of employment.

> Group A, permanent employees with classified status and employees without status serving under appointments without time limitation;
>
> Group B, employees serving under appointments limited to the duration of the war and not to exceed six months thereafter, or otherwise limited in time to an appointment in excess of one year, except those in Groups A and C;
>
> Group C, employees serving under appointments with a time limitation of one year or less. (5 C. F. R. Supp., 1947, Sec. 20.3, pp. 277–278, Appellee's App. 32–34).

Within each group, except Group A, there are four subgroups as follows:

> (1) With veteran preference with efficiency rating of "Good" or better.
>
> (2) Without veteran preference with efficiency rating of "Good" or better.
>
> (3) With veteran preference where efficiency rating is less than "Good".
>
> (4) Without veteran preference where efficiency rating is less than "Good".

In Group A, the highest retention group, there was, in addition to the four subgroups above, subgroup A–1 plus. The latter was applicable, in general, to veterans for the period of their one year reemployment right, under the terms of the Selective Service and Training Act, following their return from military service.

The regulations provided that reduction in force were to be made in any competitive level by starting in the lowest subgroup—subgroup C–4. Competitive level was defined as "all positions in the same grade of the same service, trade or profession (although they may have different titles or different pay rates, in which interchange of personnel is feasible)." Thus, for example, P–3 attorneys in a government agency are in competition with each other but are not regarded as competing with P–4 or P–6 attorneys.

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Appellants' position rests primarily upon two contentions. These are:

1. The invalidity of the Commission's retention preference regulations; and

2. The illegality of the war service limitations upon their appointments.

I

The separation of appellants, having been affirmed by the Civil Service Commission, will not be reviewed by the Court

Probably few principles of law are more definitely established than that expressing the forebearance of the courts in matters involving the internal administration of the executive branch of the government. The courts will not review the acts of executive officials performed within the scope of their authority nor will the courts substitute their judgment for that of the executive officials. "The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them." Taney, C. J. in *Decatur* v. *Paulding,* 39 U. S. (14 Pet.) 496, 515 (1840); *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 131–132 (1940).

This principle of nonintervention in the normal functions and duties of the executive branch of the government has had perhaps its most frequent expression and application in cases, such as those at bar, involving matters related to executive personnel administration. *Keim* v. *United States,* 177 U. S. 290 (1900); *Eberlein* v. *United States,* 257 U. S. 82 (1921), aff'g. 53 Ct. Cls. 466 (1918); *White* v. *Berry,* 171 U. S. 366 (1898); *Siskind* v. *Morgenthau,* 152 F 2d 286 (App. D. C. 1945); *Friedman* v. *Schwellenbach,* 159 F 2d 22 (App. D. C. 1946), cert. den. 330 U. S. 838; *Hammond* v. *Hull,* 131 F 2d, 23 (App. D. C. 1942), cert. den. 318 U. S. 777 (1943); *Love* v. *United States,* 108 F 2d 43 (C. C. A. 8th, 1939), cert. den. 309 U. S. 673 (1940); *Levine* v. *Farley,* 107 F 2d 186 (App. D. C. 1939), cert. den. 308 U. S. 622 (1940); *United States ex rel. Taylor* v. *Taft,* 24 App. D. C. 95 (1904), writ of error dismissed 203 U. S. 461 (1906).

These actions fall directly within the scope of this rule. The fact that appellants are veterans whose rights derive from the Veterans Preference Act of 1944 in no way changes, alters or suspends the rule. *Keim* v. *United States, supra, Longfellow* v. *Gudger,* 16 F. 2d 653, 57 App. D. C. 50; *Persing* v. *Daniels,* 43 App. D. C. 470; *United States ex rel Taylor* v. *Taft, supra; Love* v. *United States, supra.* Instead, that statute in providing an administrative remedy by way of appeal to the Civil Service Commission (Section 14 of the Act, 5 U. S. C. Sec. 863), whose decisions are final and binding on the employing agency, operated to restrict further the scope of judicial inquiry in cases such as these since it thereby provides a speedy, adequate and complete legal remedy.

Appellants, war service appointees to the Federal service were appropriately classified under existing Civil Service Rules governing reductions in force, and separated from the service by appellee pursuant to these rules. They appealed to the Commission under the provisions of Section 14 of the Veterans Preference Act of 1944, 15 U. S. C. Sec. 863. The decisions of the Commission, based upon a consideration of all of the facts in each case (R. 34–35, 84–85) were adverse to appellants on the grounds that appellee had fully complied with Section 12 of the Veterans Preference Act of 1944 and the rules of the Commission issued pursuant thereto. The action of appellee dismissing them was therefore affirmed and their appeals dismissed.

It is submitted that with this showing in the record, the limit of judicial inquiry is reached.

In *Keim* v. *United States, supra,* the plaintiff was a veteran of the Civil War who had been separated by the Department of the Interior. He invoked the then existing veterans preference statute (Section 3 of the Act of August 15, 1870, 19 Stat. 169) which provided:

> * * * in making any reduction of force in any of the executive departments, the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States * * *

Appellant sued in the Court of Claims, contending that nonveterans were being retained for similar work for which he was equally qualified. The Department of Interior had ruled that he was inefficient. The Court of Claims refused to pass upon the question of whether Keim was equally qualified as against the nonveteran retained. The United States Supreme Court said (pp. 295–296):

> Nowhere in these statutory provisions is there anything to indicate that the duty of passing, in the first instance, upon the qualifications of the applicants, or, later, upon the competency or efficiency of those who have been tested in the service, was taken away from the administrative officers and transferred to the courts. Indeed, it may well be doubted whether that is a duty which is strictly judicial in its nature. It would seem strange that one having passed a civil service examination could challenge the rating made by the commission and ask the courts to review such rating, thus transferring from the commission, charged with the duty of examination, to the courts a function which is, at least, more administrative than judicial; and if courts should not be called upon to supervise the results of a civil service examination equally inappropriate would be an investigation into the actual work done by the various clerks, a comparison of one with another as to competency, attention to duty, etc. These are matters peculiarly with the province of those who are in charge of and superintending the departments, and until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers.

In the case of *Levine* v. *Farley, supra,* which involved the removal for cause of an employee of the Post Office Department, this Court (Groner, C. J.) stated:

> * * * Unless, therefore an examination of the record shows (a) that the action of the Postmaster General in removing petitioner from office was clearly a

> violation of some provision of law or (b) that the Postmaster General failed to observe and carry out the procedure for removal as provided by law, we must affirm the action of the lower court.
>
> * * * * *
>
> We, therefore, hold that, where action is taken in removing from office an employee in the classified service and the action is in accordance with the requirements of the statute relating thereto, such action is not reviewable by mandamus, and a court of law has no jurisdiction to inquire into the guilt or innocence of the employee as to the charges upon which he was removed.

This Court has recently strongly reaffirmed this doctrine. In *Levy* v. *Wood et al.*, No. 9770, decided November 28, 1948, this Court declared:

> It is fully established that if the prescribed procedure, if any, is followed and no constitutional or statutory right is denied, action of executive officers in discharging employees is not subject to revision by the Court.

Indeed, this rule is an aspect of the broader principle that when the performance of official duty requires an interpretation of the law, which governs or limits the extent of that performance the interpretation placed by the officer upon the law will not be interferred with unless the official action is arbitrary or capricious. (See *Bates & Guild Co.* v. *Payne,* 194 U. S. 106; *Dunlap* v. *Black,* 126 U. S. 40; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113; *Ness* v. *Fisher,* 223 U. S. 683; *Riverside Oil Co* v. *Hitchcock,* 190 U. S. 316; *Hall* v. *Payne,* 254 U S. 343; *United States* v. *Lynch,* 137 U. S. 280; and *Commercial Solvents Corp.* v. *Mellon,* 51 App. D. C. 146, 277 F. 548).

There is no showing of arbitrary, capricious or unreasonable action in the record. The Civil Service Commission has found there was no violation of appellants' rights. It is submitted that this Court need go no further, and may, without more, affirm the judgment of the Court below.

II

Assuming the Secretary's action, separating appellants, is subject to judicial review, it was a valid exercise of legal authority conferred by law and regulations

Appellants were appointed to the position of attorney in the service of the Department of Agriculture in July and August, 1943 (R. 41–42, 84), respectively. The appointments, with tenure limited to the maximum period of six months after the termination of the war (R. 41–42, 84), were so-called war service appointments. Under the rules and regulations of the Civil Service Commission which governed the appointment of all attorneys at that time, appellants could not have secured any more extended tenure or classified status.

The regulations which governed the appointment of attorneys to the Federal Service in July 1943 were the Regulations of the Board of Legal Examiners, adopted by the Legal Examining Section of the Civil Service Commission, successor to the Board (R. 36).[1] These Regulations provided, in pertinent part, as follows (5 C. F. R. Cum. Supp., 1456–1457):

PART 17—BOARD OF LEGAL EXAMINERS

* * * * *

17.1 *Appointments*

* * * * *

(g) *All appointments to attorney and law clerk-trainee positions shall be for the duration of the present war and for six months thereafter, unless otherwise specifically limited to a shorter period, and shall be made subject to the satisfactory completion of a trial period of one year.* Such appointments shall be effected under Executive Order No. 9063 of February 16, 1942 (Title 3, *supra*), and persons thus appointed will not thereby acquire a classified Civil Service status. No person shall be appointed unless (1) he has qualified by passing an appropriate examination prescribed by the Board or,

[1] Executive Order 9358, June 30, 1943, 8 Fed. Reg. 9175; Civil Service Acts, Rules and Regulations, Annotated (Amended to October 31, 1943) p. 171.

> (2) in case of special emergency, the Board has authorized his appointment subject to subsequent examination. Such appointments shall in other respects be governed by the requirements and procedures prescribed by these Regulations. This paragraph shall become effective March 16, 1942. [Italics supplied.]

This section, kept dormant by appellants in their analysis (Br. 36, 44, 47, 48), controlled their appointments. Of course they were appointed from the register of eligibles (Par. 17.8),[2] but by the explicit terms of the Regulations such appointments could only be war service appointments, subject to the completion of a trial period of one year (Sec. 17.1 (g), *supra*, R. 41–42).

As pointed out above, when the Civil Service Rules were revised on May 1, 1947, by Executive Order 9830, 12 Fed. Reg. 1259, 3 C. F. R. Supp., 1947, 1091, the War Service Regulations having previously been abolished, elaborate regulations were established for the conversion of the majority of appointments to nonlegal positions made under the War Service Regulations to the classified (competitive) civil service (Commission Regulations, 5 C. F. R. Supp., 47, Secs. 10.1 et seq., pp. 271 et seq.). As for legal appointments under the revised Rules, all attorney positions were placed in Schedule A of the Rules (Rule VI, 5 C. F. R. Supp., 1947, p. 249) and thereby excepted from the competitive service.

Therefore, under Executive Order 9830, *supra*, the Civil Service Commission, by Departmental Circular No. 497, Supp. No. 2, withdrew, as of May 1, 1947, the authority of employing agencies to continue in employment attorneys with war service appointments (Appellee's App. 35; R. 38), and authorized their conversion to appointments under the authority of Schedule A. Accordingly, on May 1, 1947, the appointments of appellants were converted by appellee to Schedule A appointments, with an identical war service tenure limitation (R. 43, 84).

It is thus apparent that for the entire period of their service appellants were war service appointees, with tenure lim-

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[2] As revised on April 19, 1943, par. 17.8 became par. 17.6, 5 C. F. R. Cum. Supp. 1459.

ited to a maximum period of six months after the termination of the war. Consequently, under the law, and Rules of the Civil Service Commission, during the period of their service as attorneys appellants could not and did not secure permanent status in the classified (competitive) civil service.

This Court has recently upheld the provisions of the Commission's War Service Regulations identical to Section 17.1 (g), *supra*, providing that employees appointed pursuant thereto would receive war service appointments and could not thereby acquire a classified (competitive) civil service status. *Levy* v. *Woods et al.*, No. 9770, decided November 22, 1948.

1. As war service appointees, appellants were properly classified under applicable regulations for retention preference in a reduction in force

On May 1, 1947, the Commission, pursuant to Executive Order 9830 (12 Fed. Reg. 1259) *supra*, and Section 12 of the Veterans Preference Act of 1944, 5 U. S. C. Sec. 861 (58 Stat. 390), also revised its Retention Preference Regulations for use in Reductions in Force (5 C. F. R. Supp., 1947, pp. 276 *et seq.*). These regulations, as we have seen, in pertinent part, provided that, for retention preference in reduction in force, employees should be classified according to tenure of employment in competitive retention groups as follows: [3]

> Group A: All employees who have met all requirements for indefinite retention in their present positions. With respect to positions subject to the Civil Service Act and rules, this includes all employees currently serving under absolute or probational civil service appointments or who were appointed, reappointed, transferred or promoted from absolute or probational civil service appointments to war service indefinite or trial period appointments without a break in service of thirty days or more. With respect to positions excepted from the Civil Service Act and rules, this includes all employees currently serving under appointments without time limitation.

[3] The regulation so providing has been set forth in pertinent part in the appendix to this brief.

> Group B: All employees serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.
>
> Group C: All employees serving under appointments specifically limited to one year or less, all non-citizen employees serving within the continental limits of the United States, all employees continued beyond the automatic retirement age, and all annuitants appointed under section 2 (b) of the Civil Service Retirement Act, as amended. (Sec. 20.3, pp. 277–278.)

Appellants, therefore, with appointments limited to the period of the war and not to exceed six months thereafter, fell precisely within Group B, above, and were so classified by appellee.

2. The Retention Preference Regulations establishing classifications of employees for retention preference in reductions in force, of which Group B was a part, were wholly valid

Section 12 of the Veterans Preference Act provides:

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: Provided, that the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: Provided, further, that preference employees whose proficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings:
> * * *

In carrying out the directive of that statute the Commission classified civil service employees according to the tenure of

their employment, as provided for in the statute, in competitive retention groups and subgroups, of which Group B included appointments limited to the duration of the war and six months thereafter. As veterans with such appointments, appellants were properly classified in Group B and had preference over all non-veteran employees within that group. This preference these appellants received. They were entitled to no more under the Act and the regulations. To hold otherwise would emasculate the civil service so that a veteran with the most limited appointment would have preference over a civil servant with permanent classified status.

This Court has already passed on the validity of these regulations in *Hilton* v. *Sullivan*, 83 App. D. C. —, 165 F. (2d) 251; aff'd 334 U. S. 323. In that case, a non-veteran with permanent tenure attacked the validity of the regulations because of the preference given to a veteran employee with permanent tenure but less years experience. Because both had permanent tenure they were placed in Group A, but in different sub-groups. This Court, in upholding the validity of the regulations, stated (165 F. (2d) 253):

> The question before us is whether the regulations are reasonable under the statute. It is true that the Commission has given "due effect" to the four statutory factors by a sort of seriatim application. First there is a classification by tenure; then a sub-classification by veterans' preference; then a sub-classification by efficiency ratings; and within the sub-classifications length of service is applied.
>
> We cannot say that this is an unreasonable method of applying the wholly general directives of the statute. We cannot, therefore, hold the regulations void.

And the Supreme Court in upholding the validity of the classification within Group A, of necessity, affirmed the validity of the primary division between A and B based on the tenure of employment of employees. *Hilton* v. *Sullivan, supra.*

To argue that these regulations violated Section 4 of the Act of August 3, 1912 (37 Stat. 413), as do the appellants (Br. 19, 20), is to ignore the plain language of that Act and the subsequent executive orders and civil service regulations

issued under the Act. That Section gives appellants no other or greater rights than they had under Section 12 of the 1944 Act.

In the first place, Section 4 of the Act of 1912 has been superseded by the Veterans Preference Act of 1944. But even if still in effect, by its express terms, Section 4 of the 1912 Act applied only to the *classified* departmental civil service of the District of Columbia, and appellants held no such appointments. As we have seen, they held war service appointments until May 1, 1947, when their appointments with the same tenure were converted to Schedule A of the Civil Service Rules which specifically exclude the appointments from the classified civil service.

The scope of the 1912 statute is made clear by the successive executive orders and regulations issued by the Civil Service Commission under that Act. Thus, in 1943, just prior to passage of the Veterans Preference Act of 1944, which superseded Section 4 of the Act of 1912, reduction in force regulations of the Civil Service Commission specifically separated all civil service employees into different categories according to their tenure, with permanent employees having the highest retention status (5 C. F. R. Supp. 1943, secs. 12.301–12.313). "Thus all permanent employees, regardless of veterans preference and of efficiency rating, enjoyed priority over all employees with limited tenures." *Hilton* v. *Sullivan, supra,* p. 337, fn. 10. Under the 1912 Act, therefore, appellants had no greater rights under the Act and regulations than they had under the 1944 Act and regulations.

It should be pointed out that the 1943 regulations were specifically called to the attention of Congress at the time that Section 12 of the Act of 1944 was under consideration. That Section 12 followed the pattern of the 1943 regulations in providing military preference was made abundantly clear by Civil Service Commissioner Flemming at the hearings before the Senate Civil Service Committee (78th Cong., 2d sess., on S. 1762 and H. R. 4115, p. 27). His testimony, in part, reads:

> Section 12 is an important section because it deals with the problem of reduction in force in the Federal Service.

You will note the first part of the section provides [reading]:

"Competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings."

I might say that our existing reduction-in-force regulations are in harmony with that.

Then it goes on as follows:

"*Provided,* That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service."

That reenacts a provision that has been in the law [reading]:

"That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings."

That provision is substantially the same as a law passed by Congress in 1912, which was interpreted to apply only to the departmental service. By Executive Order of March 3, 1923, the provisions of the law of 1912 were likewise extended to the Federal Service, so that the last provision simply continued what has been in practice throughout the entire Federal service since 1923.

It is submitted, therefore, that the reduction in force regulations are a valid and proper exercise of the power conferred upon the Commission and in conformity with the congressional directive set forth in Section 12. The regulations, being within the statutory directive, therefore, will not be overturned by the Court.

It should be noted that Section 14 of the Act requires that "30 days advance written notice" be given to permanent or indefinite preference eligibles. The appellants had no such appointment, and though not entitled to such a notice were in

fact given 30-day notices. The record discloses (R. 19, 78) that on May 29, 1947, appellants were notified that they would be separated, effective June 30, 1947, and that they had the right to appeal from said action to the Civil Service Commission (R. 45, 84–85). The record further discloses that each of appellants so appealed and that the Commission decided their appeals adversely to them (R. 33–34, 84–85). Appellants therefore have been accorded the full measure of their rights under both Sections 12 and 14 of the Veterans Preference Act of 1944.

CONCLUSION

For the foregoing reasons, the judgments of the District Court should be affirmed.

Respectfully submitted.

H. G. MORISON,
Assistant Attorney General.
GEORGE MORRIS FAY,
United States Attorney.
EDWARD H. HICKEY,
Special Assistant to the Attorney General.

Of counsel:

EUGENE T. MAHER,
Attorney, Department of Justice.

APPENDIX

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PART 17—REGULATIONS OF THE BOARD OF LEGAL EXAMINERS

The regulations of the Board of Legal Examiners are revised and amended as follows:

Sec.

17.1 Appointments.
17.2 Position of law clerk trainee.
17.3 Promotion, transfer and reassignment.
17.4 War service transfer.
17.5 Reinstatement.
17.6 Registers of eligibles.
17.7 Register applicants entering military service.

AUTHORITY: §§ 17.1 to 17.7, inclusive, issued under E. O. 8743, 6 F. R. 2117, as amended by E. O. 9230, 7 F. R. 6665; 54 Stat. 1211, 5 U. S. C. 631 (a), 681.

§ 17.1 *Appointments.* (a) If a person whose appointment to an attorney position was authorized by the Board prior to March 16, 1942, subject to later non-competitive examination, fails to pass the examination, his appointment shall terminate within 30 days after notification by the Board to the department or agency in which he is employed, except that in cases of special emergency he may be retained, without acquiring civil service status, for such longer period as the Board, in its discretion, deems necessary. A person whose appointment was authorized prior to March 16, 1942 and who passes a non-competitive examination acquires a classified civil service status six months from the date of his appointment, if there has been compliance with the provisions of Section 2.6 of this chapter, other than those provisions relating to recommendation and examination.

(b) Except as provided in paragraph (g) of this section, no person may be appointed to an attorney position unless he has passed a non-competitive examination prescribed by the Board or has his name listed on an attorney register applicable to the position to which he is appointed. The non-competitive examination will be given only to a person whose proposed appointment has been submitted to the Board by an appointing officer.

(c) The following qualifications will be required:

(1) *For appointment to Grade CAF–4.* Graduation from a recognized law school as defined by the Commission, to wit, a law school authorized to confer the Bachelor or higher degree in law, which requires residence work. No person shall be eligible for appointment to this position who has failed a bar examination since his graduation from law school and who has not subsequently passed such an examination, or who has, except for good cause shown, failed to take a bar examination within one year of graduation from law school.

(2) *For appointment to Grade P–1 and higher.* Admission to the bar and the following professional experience or its equivalent: P–1, none; P–2, one year; P–3, eighteen months; above P–3, three years. In judging the equivalent of professional experience, special qualifications may be taken into consideration.

(d) Non-competitive examinations shall be conducted by or under the supervision of examining committees of three members to be appointed by the Chairman of the Board or pursuant to his direction and such committees shall determine the eligibility or ineligibility of the candidate. The determination shall be based upon (1) the record and experience of the candidate and (2) an oral examination. The oral examination may be waived in the case of appointments above P–5 and in the case of any war service appointment, if the examining committee is satisfied, without regard thereto, that the candidate is eligible.

(e) The determination of the examining committee in non-competitive examinations shall be final, except that within fifteen days after notification of failure an unsuccessful candidate may petition the Board to review the determination. Such review is discretionary and will be granted only for good cause shown.

(f) Examinations shall be directed to determining whether the candidate possesses the competence requisite for the professional grade generally rather than for any particular position within the grade.

Notwithstanding the foregoing provision a person employed in a position other than an attorney position may be approved for an attorney position in the same agency in a grade not high-

er than P–3 provided (1) that he meets the minimum requirements prescribed in paragraph (c) of this section; (2) that his assignment will be limited to work which calls primarily for knowledge of the particular agency; (3) that his experience in the agency especially qualifies him for the type of work for which he is proposed; and (4) that the examining committee is satisfied of his ability to perform competently the type of work to which he will be assigned. Persons thus approved for particular positions shall be eligible to acquire qualified Civil Service status as attorneys. Persons who acquire or who are approved for qualified Civil Service status as attorneys may not be reassigned to a different type of work or transferred to another agency without first passng such competitive or noncompetitive tests as the Board may prescribe. Promotion to any grade above P–3 shall *per se* be deemed reassignment for the purpose of this section.

(g) All appointments to attorney and law clerk-trainee positions shall be for the duration of the present war and for six months thereafter, unless otherwise specifically limited to a shorter period, and shall be made subject to the satisfactory completion of a trial period of one year. Such appointments shall be effected under Executive Order No. 9063 of February 16, 1942 (7 F. R. 1075), and persons thus appointed will not thereby acquire a classified Civil Service status. No person shall be appointed unless (1) he has qualified by passng an appropriate examination prescribed by the Board or, (2) in case of special emergency, the Board has authorized his appointment subject to subsequent examination. Such appointments shall in other respects be governed by the requirements and procedures prescribed by these Regulations. This paragraph shall become effective March 16, 1942.

§ 17.2 *Position of law clerk trainee.* Pursuant to the definite recommendation contained in Plan A of the Report of the President's Committee on Civil Service Improvement, the Board recommends the immediate establishment of a general position classification consisting of non-professional law clerk duties, preparatory in character for professional legal work. The position should have a designation indicating its training or preparatory character. Government departments

and agencies having legal staffs should, wherever possible, include such positions in their legal organizations, as a means of recruiting able law school students. Since these appointments are to permit preparation for professional legal work, they shall be made with an expressly stipulated condition that the appointee prior to entrance upon duty shall have obtained a law degree and shall obtain membership in the bar of a State or Territory, or the District of Columbia, within a period of 18 months from his appointment. Failure to meet this condition should result in his separation, or assignment to other duties. Upon acquiring bar membership, the appointee should be immediately eligible for assignment as Junior Attorney.

§ 17.3 *Promotion, transfer and reassignment.* (a) A person who has civil service status as an attorney may be transferred or reassigned without examination to an attorney position within the grades in which he has such status. Subject to a non-competitive examination approved by the Board, he may be promoted, transferred, or reassigned to a position in a higher grade.

(b) Except as provided in paragraph (c) of this section, the incumbent of any attorney position included within the Civil Service who has neither civil service status as an attorney nor eligibility for such status acquired through recommendation under the terms of an executive order or statute may not be promoted, transferred, or reassigned to any other position in the Civil Service. Such incumbents, if they have not failed a non-competitive examination occasioned by a recommendation that they be granted civil service status; may receive war service appointments under § 17.1 (g) of this chapter to positions not covered by an existing attorney register and to positions covered by such a register if it can be established by affirmative proof that failure to recommend them for civil service status when they were eligible to be so recommended was caused by lack of information or erroneous information concerning civil service requirements.

(c) Subject to the provisions of these regulations, a person who receives a war service appointment under § 17.1 (g) of this chapter may be promoted, transferred, or assigned to other positions for the duration of his appointment.

(d) The minimum qualifications required for new appointments by § 17.1 (c) of this chapter shall apply to promotions and transfers with increase in grade, *Provided, however,* That with the prior approval of the Board of Legal Examiners the incumbent of an attorney position whose work is certified by the Chief Law Officer of the employing agency to be of unusually high quality may without reference to the foregoing limitations be advanced to a position in the same agency in the next higher grade.

§ 17.4 *War service transfer.* (a) On and after March 16, 1942 all transfers from one attorney position to another such position shall be governed by § 18.9 of this chapter, except that the determinations required thereunder shall be made by the Board of Legal Examiners.

(b) Incumbents of attorney positions who desire to transfer under the War Service Regulations shall file with the Board of Legal Examiners a statement to that effect, accompanied by Form 3821 ("Application for Attorney Positions") unless this form has previously been filed with the Board.

§ 17.5 *Reinstatement.* (a) A person who has civil service status as an attorney and who is separated from a civilian position in the Federal service after serving a probationary period in an attorney position may, upon passing a non-competitive examination when required by the Board, be reinstated to an attorney position provided request is made by an appointing officer within 1 year of separation if the period of service was less than 2 years, within 2 years if the period of service was 2 years or more but less than 3 years, within 3 years if the period of service was 3 years or more but less than 4 years, within 4 years if the period of service was 4 years or more but less than 5 years, or at any time if the period of service was 5 years or more or if the former employee is entitled to military preference in appointment or was retired upon annuity under the Civil Service Retirement Act because of total disability and is eligible for reinstatement by reason of recovery, or if the reinstatement is for war service tenure.

(b) A person separated from an attorney position during his probationary period may be reinstated subject to the other

provisions of these regulations; but if the separation was by reason of voluntary resignation prior to the completion of six months of satisfactory service, he may be reinstated only in the same agency. Reinstatement under this section will be subject to the completion of the original probationary period if in the agency from which the employee was separated or if the separation occurred after six months of satisfactory service; in other cases it will be subject to the satisfactory completion of a new probationary period.

(c) Subject to non-competitive examination when required by the Board but without regard to any other provisions of this section, an attorney may be retransferred to an attorney position in which he was formerly employed or to any position to which transfer could be made therefrom, if since his transfer from the attorney position he has served continuously and satisfactorily (1) in the executive or judicial civil service of the United States or of its insular possessions; (2) in the legislative service; (3) in the service of a state, county, municipality, or foreign government in a position in which he has acquired valuable training and experience; or (4) in a training course approved by the Board in an educational institution of recognized standing.

(d) Subject to non-competitive examination when required by the Board, a person who receives a war service appointment to an attorney position under § 17.1 (g) of this chapter and who is separated therefrom, may be reinstated to an attorney position with war service tenure.

§ 17.6 *Registers of eligibles.* Registers of eligibles for attorney positions shall contain such numbers, be applicable to such positions, and be effective for such periods as the Board shall determine and announce. The publication of each register and of the supplements thereto shall constitute the certification of the eligibles included. The register, together with pertinent information concerning the eligibles which the Board will supply, shall be available in full to appointing officers, who may make selections for appointment from among those included, subject to the Board's stated minimum experience requirements for particular grades of positions and with the exception that the Board may from time to time suspend the

certification of eligibles from particular States in order to give effect to the principle that appointments shall so far as practicable be distributed among the States in proportion to population. Except as to individuals of whom the Board is advised by appointing officers in advance of publication of the register, all appointments to the positions and for the period covered by any register shall be from the register. The selections from any register shall be communicated immediately by the appointing agencies to the Board. The Board, immediately upon entering its approval of proposed appointments, will remove the names of the appointees from the register. The Board may from time to time add to a register others who have qualified through examination, in substitution for those who have been found unavailable for appointment, and may at any time suspend or cancel the eligibility of an individual included upon register for cause arising either before or after his original certification. In case the life of a register is extended, the eligibles remaining upon it may as a condition of continued eligibility be required to furnish supplementary statements of qualifications and experience.

§ 17.7 *Register applicants entering military service.* Applicants for the Board's register who enter the military and related services or who are drafted into national service under the Selective Service Act shall enjoy the following rights, provided request is made within six months following their honorable discharge and return to civilian status:

(a) An applicant whose score upon a written examination confers eligibility for oral examination and who enters the service before his oral examination shall be entitled to take a qualifying oral examination or at the option of the Board to compete in a competitive oral examination in process at the time of his request and, if recommended by the examining committee, to be included for one year among the eligibles for positions in the grade or grades for which the original written examination was given.

(b) An applicant who enters the service after having qualified for a register but before the register is announced shall not be placed upon the register but shall be included for one year following action upon his request among the eligibles for

positions in the grade or grades covered by the register for which he had qualified.

(c) An eligible upon a register who enters the service during the life of the register shall be included among the eligibles for positions in the same grade or grades for one year following action upon his request.

The foregoing rights shall accrue regardless of the tenure and status attaching to appointments during the periods within which eligibility is conferred pursuant to this section.

By the United States Civil Service Commission.

[SEAL] H. B. MITCHELL,
President.

APRIL 19, 1943.

PART 20—RETENTION PREFERENCE REGULATIONS FOR USE IN REDUCTIONS IN FORCE

Sec.

20.1 Extent of part.
20.2 Definitions.
20.3 Retention preference; classification.
20.4 Completion of employee records.
20.5 Determination of competitive area.
20.6 Special rule relating to consolidations and mergers.
20.7 Compilation of retention register.
20.8 Sequence of selection.
20.9 Actions.
20.10 Notice to employees.
20.11 Reports to the Commission.
20.12 Special rules on liquidation.
20.13 Appeals.
20.14 Actions disapproved by the Commission.

AUTHORITY: §§ 20.1 to 20.14, inclusive, issued under sec. 12, 58 Stat. 390; 5 U. S. C. Sup. 861.

SEC. 20.1 *Extent of part.*—The regulations in this part establish degrees of retention preference and uniform rules for reductions in force. They apply to all civilian employees in the executive branch of the Federal Government, and in the municipal government of the District of Columbia, except those whose appointments are required to be approved by the Senate, and those who are appointed by the President of the United States.

SEC. 20.2 *Definitions.*—For the purpose of the regulations in this part definitions are given for words, terms, and phrases as follows:

(a) "Reduction in force" means the involuntary separation from the rolls of a department, or furlough in excess of thirty days, of one or more employees in order to reduce personnel. Reduction of personnel may have to be made because of lack of funds, personnel ceilings, reorganization, decrease of work, to make a position available for a former employee with established reemployment or restoration rights, or for other reasons. However, the term does not apply to (1) termination of temporary appointments limited to one year or less, (2) retirement of employees, or (3) separations for unsatisfactory service.

(b) "Retention groups" and "sub-groups" means classes of employees entitled to the same degree of retention preference on the basis of tenure of employment and veterans preference.

(c) "Retention credits" are credits for length of service and efficiency ratings in determining retention order in each retention subgroup. They are computed by allowing one point for each full year of Federal Government service plus five points for an "Excellent" efficiency rating, three points for a "Very Good" efficiency rating, and one point for a "Good" efficiency rating. This paragraph shall be effective with respect to notices in reductions in force issued on and after September 15, 1946, or, with respect to individual agencies, at any date prior thereto at the option of the agency: Provided, That, with respect to ungraded positions under the Navy Department this paragraph shall be effective on October 15, 1946.

(d) "Federal Government service" means the total of all periods of service eligible for consideration for civil service retirement purposes, without regard to whether the employee is eligible or will be eligible actually to receive retirement benefits. All active military service is counted whether or not veteran preference is given therefor or whether it is eligible to be considered for civil service retirement purposes. Total service shall consist only of full years of creditable service, but fractions of a year shall be considered in arriving at the total.

(e) "Efficiency rating" means (1) for employees paid under the compensation schedules of the Classification Act, the cur-

rent official efficiency rating under the Uniform Efficiency Rating System; and (2) for other employees the current efficiency rating under an efficiency rating system which has been approved by the Civil Service Commission.

(f) "Veteran preference employee" means an employee entitled to veteran preference under the Veterans' Preference Act of 1944.

(g) "Department" means an entire executive department, parent organization with constituent agencies, independent establishment, government-owned or government-controlled corporation of the Federal Government, the municipal government of the District of Columbia, or any other such organization or separate governmental agency of the executive branch of the Federal Government created by Act of Congress or Executive order.

(h) "Governmental entity" means a department, bureau of a department, parent organization, constituent agency, independent establishment, entire field installation, regional office, or field station, an operating department of the municipal government of the District of Columbia, or any other such organization or separate governmental agency of the Federal Government created by Act of Congress or Executive order.

(i) "Competitive area" means a governmental entity, a combination of governmental entities, or that part of a governmental entity for which approval has been secured from the Commission, within which employees of a competitive level are considered to be in competition.

(j) "Competitive level" means all positions in the same grade of the same service, trade, or profession (although they may have different titles or different pay rates), in which interchange of personnel is feasible.

SEC. 20.3 *Retention preference; classification.*—For the purpose of determining relative retention preference in reductions in force, employees shall be classified according to tenure of employment in competitive retention groups and subgroups, as follows:

Group A: All employees who have met all requirements for indefinite retention in their present positions. With respect to positions subject to the Civil Service Act and rules, this includes

all employees currently serving under absolute or probational civil service appointments or who were appointed, reappointed, transferred or promoted from absolute or probational civil service appointments to war service indefinite or trial period appointments without a break in service of thirty days or more. With respect to positions excepted from the Civil Service Act and rules, this includes all employees currently serving under appointments without time limitation.

A–1 Plus during one-year period after return to duty, as required by law.

A–1 With veteran preference unless efficiency rating is less than "Good."

A–2 Without veteran preference unless efficiency rating is less than "Good."

A–3 With veteran preference where efficiency rating is less than "Good."

A–4 Without veteran preference where efficiency rating is less than "Good."

Group B: All employees serving under appointments limited to the duration of the present war or for the duration of the war and not to exceed six months thereafter, or otherwise limited in time to a period in excess of one year, except those specifically covered in Groups A and C.

B–1 With veteran preference unless efficiency rating is less than "Good."

B–2 Without veteran preference unless efficiency rating is less than "Good."

B–3 With veteran preference where efficiency rating is less than "Good."

B–4 Without veteran preference where efficiency rating is less than "Good."

Group C: All employees serving under appointments specifically limited to one year or less, all non-citizen employees serving within the continental limits of the United States, all employees continued beyond the automatic retirement age, and all annuitants appointed under section 2 (b) of the Civil Service Retirement Act, as amended.

C–1 With veteran preference unless efficiency rating is less than "Good."

REPLY BRIEF FOR APPELLANTS

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 10007

ROBERT D. ELDER, *Appellant,*

v.

CHARLES F. BRANNAN, Secretary of Agriculture,
Appellee.

No. 10008

GREENE CHANDLER FURMAN, *Appellant,*

v.

CHARLES F. BRANNAN, Secretary of Agriculture,
Appellee.

Appeals from the District Court of the United States for the District of Columbia.

United States Court of Appeals
for the District of Columbia
Circuit
FILED MAY 4 1949
Joseph W. Stewart
CLERK

C. L. DAWSON,
917 - 15th St., N. W.,
Washington 5, D. C.,
Attorney for Appellants.

ROBERT D. ELDER,
4233 - 32nd Road South,
Arlington, Virginia,
Attorney pro se.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 10007.

ROBERT D. ELDER, *Appellant,*

v.

CHARLES F. BRANNAN, Secretary of Agriculture, *Appellee.*

No. 10008.

GREENE CHANDLER FURMAN, *Appellant,*

v.

CHARLES F. BRANNAN, Secretary of Agriculture,

Appeals from the District Court of the United States for the District of Columbia.

REPLY BRIEF FOR APPELLANTS.

Analysis of defense contentions.

Appellee contends that his agency action of dropping and discharging appellants was a valid exercise of legal authority conferred by Civil Service Commission regulations issued in 1947 embodying an administrative construction in

conformity with the "congressional directive" set forth in § 12 of the 1944 Act (Br. 12-18). Relative to the 1912 Act counsel argue in essence (Br. 17):

(1) that the 1912 Act is superseded and a nullity; (2) that even if in effect the 1912 Act applies only to the *classified* civil service from which appellants' Attorney positions were "specifically excluded" (Br. 17) and "excepted" (Br. 6) since May 1, 1947 by new Civil Service Rules effective that date; (3) that the Supreme Court was not free to interpret the single sentence of the "1912 proviso" separate from other context of § 4 of the omnibus Appropriation Act passed August 23, 1912; and (4) that the Supreme Court was not free to permit the plain language of the "1912 provision" to express a meaning differing in any respect from the contemporaneous administrative construction embodied in the Civil Service Commission regulations issued in 1943 (Br. 17).

Relative to the 1944 Act, appellee's argument boils down to unfounded assumptions (Br. 8-18):

(1) that the 1947 regulations of the Civil Service Commission, pursuant to which appellee states he separated appellants, were in conformity with § 12 of the 1944 Act; (2) that the "congressional directive" in the *first clause* of § 12 must be deemed to prevail regardless of the special withdrawal and exception by the mandatory second proviso in § 12; (3) that the Supreme Court was not free to interpret the *second proviso* in § 12 as expressing a meaning differing in any respect from the contemporaneous administrative construction embodied in the 1947 regulations; (4) that the Supreme Court was in error in holding that the *second proviso* in § 12 of the 1944 Act is the substantial embodiment of the long standing absolute retention preference of veterans given by the 1912 Act; and (5) that in the *Hilton* case [1] the Supreme Court and the Court of Appeals, in upholding the validity of the absolute retention prefer-

[1] *Hilton* v. *Sullivan*, 334 U. S. 323, 336-339.

ence of veterans of permanent tenure under subgroups A-1 Plus and A-1 of the 1947 regulations, also upheld the regulations *in toto* and "of necessity affirmed the validity of the primary division between A and B based on the tenure of employment of employees." (Br. 16, 8-18).

SUMMARY OF ARGUMENT.

Contemporaneous administrative construction embodied in the regulations must yield to the positive language of the statutes.

Pursuant to § 18 of the 1944 Act, the 1912 Act remains in full force and effect, broadened and in no respect narrowed by the 1944 Act. In accordance with established principles, the single sentence of the "1912 proviso" has been interpreted by the Supreme Court as an independent and substantive provision separate from any other context of the Section 4 in which it is found. The Supreme Court said that "There is nothing ambiguous about this 1912 provision. It was an absolute command that no governmental department should discharge, drop, or reduce in rank any honorably discharged veteran government employee with a rating of 'good'." The Supreme Court further said that the *second proviso* in § 12 of the 1944 Act is the substantial embodiment of the absolute command and the absolute veterans' retention preference contained in the 1912 Act.

The *second proviso* in § 12 is also interpreted by the Supreme Court "as a special withdrawal of the proviso-defined classes of veterans from the general terms of the first clause of § 12" of the 1944 Act and "as the congressional creation of classes of veterans' 'preference employees' who 'shall', if they have the defined efficiency ratings, 'be retained in preference to all other competing employees'." Appellee's agency action, in conformity with the administrative construction embodied in the regulations, disregards and is in direct violation of the positive language of § 12 of the 1944 Act as interpreted by the Supreme Court.

§ 2 of the 1944 Act broadened the original 1912 scope of the veterans' absolute retention preference by giving "legislative sanction" to the executive extension thereof to the field service and to positions not under civil service, as pointed out by the Supreme Court. Under settled rules of interpretation, § 2 of the 1944 Act is necessarily to be regarded as a legislative recognition and declaration by Congress that the long standing absolute retention preference of veterans given by the 1912 Act applied in 1912 and still applies in respect of all civilian positions in the Government services, embracing the *unclassified* civil service as well as the classified civil service. This Congressional recognition and declaration effectually repudiates any construction or contention that the absolute retention preference given by the 1912 Act applied or applies only to the *classified* civil service and employees of related classified tenure of employment.

In the premises, appellee's agency action was in direct violation of the proviso in § 4 of the 1912 Act as well as of §§ 2, 12, and 18 of the 1944 Act.

The administrative decision of the Civil Service Commission, approving appellee's agency action in dropping and discharging appellants, was in denial of their statutory rights and subject to revision by the Court. Such administrative decision turned on a pure question of law, is the appropriate subject of judicial review, and should have been considered and determined by the Court below.

ARGUMENT.

Regulations yield to positive language of statutes.

The inceptive attention and weight to be given to contemporaneous construction of a statute by administrative officers charged with its execution is a rule of interpretation, but it is by no means an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. However long continued by suc-

cessive officers, such administrative construction must yield to the positive language of the statutes.[4] Considerations of this nature or of inconvenience can never sanction a construction at variance with the manifest meaning of the legislature, expressed in plain and unambiguous language.[5] If the language is plain and the meaning clear, the duty of interpretation does not arise and the sole function of the courts is to enforce the statute according to its terms.[6] The regulations and the administrative decision of the Civil Service Commission concerned herein clearly fall within these established principles.

The positive language and interpretation of the statutes.

Pursuant to § 18 of the 1944 Act, the 1912 Act remains in full force and effect, broadened and in no respect narrowed by the 1944 Act.[1, 2] The Supreme Court said that any interpretation or holding is prohibited which "would mean that passage of the Veterans' Preference Act in 1944 narrowed the long-existing scope of veterans' preferences in case of reduction in force of government personnel" [1] Id. 337.; and said that the 1944 Act did not take away or narrow any existing preference rights given either by statute or executive order, but strengthened and broadened the veterans' preferences then embodied in statutes and executive orders [1] Id. 338-339 [2], and that the long standing absolute retention preferences of veterans are embodied in the 1944 Act [1] Id. 339.[3]

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[2] *Wettre* v. *Hague*, 1 Cir., 168 F. 2d 825, 826.

[3] *Johnson* v. *War Assets Administration*, 7 Cir., 171 F. 2d 556, 558.

[4] *Houghton* v. *Payne*, 194 U. S. 88, 100; *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 330, 331; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Swendig* v. *Washington Water Power Co.*, 265 U. S. 322, 331; *Louisville & Nashville R. Co.* v. *United States*, 282 U. S. 740, 757, 759; *Texas & Pac. R. Co.* v. *United States*, 289 U. S. 627, 640; *United States* v. *Tanner*, 147 U. S. 661.

[5] *Evans* v. *Jordan & Morehead*, 9 Cranch, U. S. 199, 203; *United States* v. *Fisher*, 2 Cranch, U. S. 358, 386; *Crooks* v. *Harrelson*, 282 U. S. 55, 60.

[6] *Caminetti* v. *United States*, 242 U. S. 470, 485; *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 409; *Dewey* v. *United States*, 178 U. S. 510, 520, 521; *Houghton* v. *Payne*, *supra*.

In accordance with established principles,[7] the Supreme Court interpreted the single sentence of the "1912 proviso" as an independent and substantive provision separate from any context of the Section 4 in which it is found.[1] Id. 336.[2,7] The Court said:

> "There is nothing ambiguous about this 1912 provision. It was an absolute command that no governmental department should discharge, drop, or reduce in rank any honorably discharged veteran government employee with a rating of 'good'."[1] Id. 336.[2,3]

The Supreme Court further said that the *second proviso* in § 12 of the 1944 Act is the substantial embodiment of the absolute command and the absolute veterans' retention preference contained in the 1912 Act, "which as before pointed out, provided for an absolute veterans' retention preference * *".[1] Id. 338-339.[3]

In addition to being the embodiment of the effect and import of the 1912 absolute command, both the Government and the Supreme Court united in regarding the *second proviso in* § 12 "as a special withdrawal of the proviso-defined classes of veterans from the general terms of the *first clause* of § 12" of the 1944 Act and "as the congressional creation of classes of veterans' 'preference employees' who 'shall', if they have the defined efficiency ratings, 'be retained in preference to all other competing employes'"[1] Id. 335-336. Under the established rule thus indicated,[8] the *second proviso* in § 12 definitely withdrew and excepted

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[7] *United States* v. *Babbit*, 66 U. S. 55, 61; *Springer* v. *Government of the Philippine Islands*, 277 U. S. 189, 207; *MacDonald* v. *United States*, 279 U. S. 12, 20-21; *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 242, 246; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 181; *American Express Co.* v. *United States*, 212 U. S. 522, 534; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36, 37; *Schlemmer* v. *Buffalo R. Co.*, 205 U. S. 1, 10; *United States ex rel. Southern Pac. R. Co.* v. *Lane*, 46 App. D. C. 74, 82; *United States* v. *Scruggs etc. Co.*, 8 Cir., 156 Fed. 940, 942.

[8] *MacDonald* v *United States*, 279 U. S. 12, 20-21; *United States* v. *Morrow*, 266 U. S. 531, 534-535; *Cox* v. *Hart*, 260 U. S. 427, 435; *White* v. *United States*, 191 U. S. 545, 551; *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 242-246; *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174, 181; *Minis* v. *United States*, 15 Pet. 423, 445; *United States ex rel. Bride* v. *MacFarland*, 18 App. D. C. 120, 126.

such veterans, including these appellants, from the operative effect of the general provisions reading that "competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings:"[8]

Violation of the 1944 Act.

Despite the aforesaid (1) absolute command and (2) explicit withdrawal and exception of veterans from the provisions requiring due effect to be given to *tenure of employment,* etc., appellee states that "In carrying out the directive of the statute the Commission classified civil service employees [*including these withdrawn and excepted veterans*] according to the tenure of their employment," (Br. 15-16, 6-7). Appellee insists that the appellant veterans were properly classified *according to the tenure of their employment* in subgroup B-1 of the regulations, that the appellants were properly separated by appellee pursuant thereto, and that "They were entitled to no more under the Act and the regulations." (Br. 16). Meanwhile, eight other Attorneys, Grade P-3, being competing nonveteran nonpreference employees of the same "competitive level" Grade as appellants (Br. 7) were by the tenure of *their* employment classified in subgroup A-2 and retained on active duty by appellee (R. 48, 51). Soon after appellants' final discharge [for appellee's stated reason that separation was "necessitated" by "lack of funds" R. 7, 46.] six additional Attorneys, Grade P-3, being nonveteran nonpreference employees classified in the inferior subgroup B-2, were put back to work and continued on active duty by appellee (R. 52-54).

It is apparent that appellee's agency action—in conformity with the administrative construction of § 12 of the 1944 Act embodied in the Civil Service Commission regulations —disregarded the *second proviso* in § 12 with a sort of selective blindness, and misconstrued the first clause by it-

self alone as being the *only* "congressional directive" (Br. 6, 15, 18) in § 12, or anywhere else, which appellee was under any legal obligation to obey with respect to veterans' preference employees.[8] Administrative rulings cannot add to, or subtract from, the terms of an act of Congress.[9]

The applicable portion of the second proviso of § 12 of the 1944 Act reads: "*Provided further,* That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees * * *". In addition to embodying the absolute command and absolute retention preference contained in the 1912 Act, as held by the Supreme Court *supra*[1] Id. 338-339[3], and functioning as a special withdrawal and exception from the operative effect of the general provisions of § 12 relating to tenure of employment, etc., these plain words of the *second proviso* speak for themselves. Under elementary principles, the intention of the Congress is to be sought primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture[10], and the words used by Congress in a statute are presumed to be used in their natural import and usual and most ordinary sense, and with the meaning commonly attributed to them[11].

"*All other competing employees*" thus means all competing employees *other* than preference employees[12], a meaning unnecessarily corroborated by the correlative use of the words "competing nonpreference employees" in the next ensuing sentence of the second proviso. "*Competing*", in its natural import and usual and most ordinary sense accord-

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[9] *United States* v. *Standard Brewery, Inc.*, 251 U. S. 210, 217-220; *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, 508; *Schanzer* v. *Bowles, Price Administrator*, Em. Ct. App., 141 F. 2d 262, 264; *Durkee Famous Foods, Inc.* v. *Harrison, Collector of Internal Revenue*, 7 Cir., 136 F. 2d 303, 307.

[10] *Thompson* v. *United States*, 280 U. S. 420, 442; and cases *supra* 5, 6, and 9, 11.

[11] *Caminetti* v. *United States*, 242 U. S. 470, 485; *United States* v. *Lexington Mill & Elevator Co.*, 232 U. S. 399, 409-410.

[12] *United States* v. *Mescall*, 215 U. S. 26, 31-32.

ing to *Webster*, means "seeking or striving for the same thing, position, or reward for which another is striving", to-wit, as here the positions of Attorneys, Grade P-3 stipulated by appellee (Br. 7). Under the positive language of § 12 of the 1944 Act, appellee was clearly and mandatorily required to retain the appellant veterans in their positions as Attorneys, Grade P-3, in preference to all other nonveteran nonpreference Attorneys, Grade P-3; and appellee's admitted failure so to do violated appellants' legal rights under the 1944 Act.

Moreover, pursuant to § 18 of the 1944 Act and the determinations of the Supreme Court[1], appellee was subject under the *second proviso* in § 12 to the embodied import and effect of the absolute 1912 command not to discharge, drop, or reduce in rank or salary any such veteran government employees as these appellants. And this without reference to any other employees whether "competing" or otherwise, and particularly without any interpretation of the language of § 12 of the 1944 Act which "would mean that passage of the Veterans' Preference Act in 1944 narrowed the long-existing scope of veterans' preferences in case of reduction in force of government personnel"[1], Id. 337.

The *second proviso* of the 1944 Act also implements the meaning and all-comprehensive scope of the 1912 retention preference in the Government services recognized and declared by Congress in § 2 of the 1944 Act, i.e., as embracing the *unclassified* civil service as well as the classified civil service. *Infra.*[13, 14]

§ 2 of the 1944 Act broadened the original 1912 scope of veterans' absolute retention preference to extend to the field service and to positions not under civil service, thus giving "legislative sanction" to executive rules and regulations

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[13] *Blair* v. *City of Chicago*, 201 U. S. 400, 475; *West Publishing Co.* v. *McColgan*, 9 Cir., 138 F. 2d 320, 326; Endlich on Statutes, § 294.

[14] *Weedin* v. *Chin Bow*, 274 U. S. 657, 668; *Johnson* v. *Southern Pac. R. Co.*, 196 U. S. 1, 21; *Wetmore* v. *Markoe*, 196 U. S. 28, 76-77; *Cope* v. *Cope*, 137 U. S. 682, 688; *Bailey* v. *Clark*, 21 Wall. 284, 288; *United States* v. *Freeman*, 3 How. 556, 564-565; *Alexander* v. *Alexandria*, 5 Cranch, 1, 7; *Great Northern Ry. Co.* v. *United States*, 315 U. S. 262, 277; *Joy Floral Co.* v. *Commissioner of Internal Revenue*, 58 App. D. C. 277, 280, 29 F. 2d 865, 868.

assuming so to do[1], Id. 337, 338. In express terms § 2 was an absolute command that the veterans' preference in retention, appointment, etc., shall be given in civilian positions in the Government services, embracing the *unclassified* civil service as well as the classified civil service, in all-comprehensive categories whether permanent, temporary, or emergency.

The 1912 Act is accordingly to be read at the present time as though the *broadening* modification or amendment provided by § 2 of the 1944 Act had always been part and parcel of the 1912 Act from the beginning[13], where the Supreme Court said:

> "* * * the act of 1859 is to be read as if had originally been in the amended form * * * 'As a rule of construction, a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does amended * * * 'A statute which is amended is thereafter to be construed as if the amendment had always been there * * *".

Violation of the 1912 Act.

But the legal effect of § 2 of the 1944 Act comprises more than a mere *broadening* of war-time veterans' preference rights beyond the 1912 departmental scope and in other respects as in § 2 expressly specified. Under settled rules of interpretation[14], § 2 of the 1944 Act is necessarily to be regarded as a legislative recognition and declaration by Congress that the long standing absolute retention preference of veterans, given by the 1876 Act and strengthened by the 1912 Act[1], Id. 336, *applied in 1912* and *still applies since 1944* in respect of all civilian positions in the Government services, embracing the *unclassified* civil service as well as the classified civil service, in all-comprehensive categories whether permanent, temporary, or emergency[14].

These settled rules of interpretation[14] require that the veterans' retention preference acts *in pari materia* of 1876, 1912, and 1944 be construed together as forming one act[15],

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[15] *Joy Floral Co.* v. *Commissioner of Internal Revenue, supra,* and other cases under [14].

just as the Supreme Court duly construed them in the *Hilton* case[1], Id. 335-339. The rules require that the later of such acts *in pari materia*—the 1944 Act—be regarded as a legislative recognition and declaration of the true construction of the prior law of 1912 and as intended to remove any doubt previously existing as to the meaning of such prior law[14].

This Congressional recognition and declaration in § 2 of the 1944 Act effectually repudiates any phase of the construction or contention on the part of appellee herein that the absolute retention preference given by the 1912 Act applied or applies only to the *classified* civil service and employees of related classified tenure of employment. It is particularly to be noted that such repudiation coincides with and serves to clinch the significant interpretation of the single sentence of the "1912 provision" by the Supreme Court, *supra,* as being an independent and substantive provision separate from any other context of the section in which it is found and in no respects limited by any other context of such Section 4 of the omnibus Appropriation Act passed August 23, 1912[7].

In the premises, the facts alleged by the plaintiffs-appellants in their amended and supplemental complaints clearly show that the agency action of appellee in dropping and discharging appellants was, and continues to be, in disregard and direct violation of their legal rights under the applicable statutes as authoritatively interpreted by the Supreme Court, being in direct violation of the positive language of the veterans' preference provision in § 4 of the 1912 Act[2], as well as of §§ 12, 2, and 18 of the 1944 Act—any regulations or administrative rulings of the Civil Service Commission to the contrary notwithstanding.[4, 5, 6, 9.]

Rule of stare decisis is inapplicable.

In respect of the 1947 regulations of the Commission, the decisions of the Supreme Court and Court of Appeals in the *Hilton* case were each confined to (1) refusal to hold invalid

the absolute retention preference of veterans provided under subgroups A-1 Plus and A-1 and (2) recognition that subgroups A-1 Plus and A-1 were in conformity with the 1876, 1912, and 1944 Acts *in pari materia* construed together as forming one act.[1] Id. 333-334, 335-339.

There is consequently no merit in appellee's contention that the Supreme Court and the Court of Appeals, in upholding the validity of the absolute retention preference of veterans of classified-permanent tenure of employment provided under subgroups A-1 Plus and A-1, affirmed the validity of the regulations *in toto* or "of necessity affirmed the validity of the primary division between A and B based on the tenure of employment of employees." (Br. 16). The question of validity of Groups B or C, or of any other than the validity of the absolute retention preference provided under subgroups A-1 Plus and A-1, was not raised or ruled upon at any stage in the *Hilton* case. There was at no time any assignment of error presenting any such question related to Groups B or C or the retention preference of any veterans of limited tenure; and no argument whatever on any such question was ever presented to the Supreme Court or the Court of Appeals in the *Hilton* case. As repeatedly stated in many other cases by the Supreme Court: "The most that can be said is that the point was in the record if anyone had seen fit to raise it. Questions that merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."[16]

Instead of a bulk affirmance *in toto* of the 1947 regulations or of the primary division of veterans between Groups A, B, and C, based on the tenure of their employment, the Supreme Court took particular pains to point out that the categorical assignment of nonveteran employees of classi-

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[16] *Kvos, Inc.* v. *Associated Press*, 299 U. S. 269, 279; *Webster* v. *Fall*, 266 U. S. 507, 511; *Tefft, Weller & Co.* v. *Munsuri*, 222 U. S. 114, 119; *New* v. *Oklahoma*, 195 U. S. 252, 256; *United States* v. *More*, 3 Cranch, 159, 172; *The Edward*, 1 Wheat. 262, 275, 276; *Sampson Motors, Inc.* v. *United States*, 9 Cir., 168 F. 2d 878, 879.

fied (permanent) tenure to the "highest retention status" under Group A and the assignment of veterans of limited tenures to lower retention status, as under Group B, was "*regardless of veterans' preference and of efficiency* rating."[1] Id. 337, the Court's footnote 10. This footnote 10 explicitly attests the Supreme Court's awareness of the disregard and violation inherent in both the 1943 and 1947 regulations of the Civil Service Commission insofar as they affect the retention preference rights of veterans of limited tenures. The legal soundness of the Court's indication of this inherent violation of the statutes is not abated by reason of its being *obiter dictum*[16]. The dictum corroborates what the Supreme Court very definitely held in its opinion, i.e., that the "absolute command" of the "1912 provision" related to and "provided for an absolute veterans' retention preference" for "any honorably discharged veteran government employee with a rating of 'good' ". [period][1], Id. 336, 338.

Judicial review is appropriate and prescribed.

Where statutory rights, as here, have been denied by agency action, the decision of the Civil Service Commission, denying appellants' appeals and approving appellee's agency action in denial and violation of such rights, is clearly subject to revision by the Court[17, 18]. Such administrative decisions or rulings cannot enlarge or diminish the meaning of statutes enacted by Congress, nor add to nor subtract from the terms of an act of Congress, nor confer legality upon agency action which is in direct violation of the statutory legal rights of appellants to the long standing absolute retention preference of veterans given by the

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17 *Levine* v. *Farley*, 107 F. 2d 186 (App. D. C. 1939); *Levy* v. *Woods*, App. D. C. 1948, No. 9770; both cited by appellee, Br. 11; and cases under 18.

18 *Dismuke* v. *United States*, 297 U. S. 167, 171; *Tagg Bros.* v. *United States*, 280 U. S. 420, 442; *Securities & Exchange Commission* v. *Chenery*, 318 U. S. 80, 94-95; *Virginian R. Co.* v. *System Federation*, 300 U. S. 515, 562; *United States* v. *Laughlin*, 249 U. S. 440, 443; *Medbury* v. *United States*, 173 U. S. 492, 497-498; *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 276; *Interstate Commerce Commission* v. *Union Pac. R. Co.*, 222 U. S. 541, 547, 548.

1876 and 1912 Acts and broadened, strengthened, and embodied under the 1944 Act[1] Id. 336-339[2, 4]. The power of the Civil Service Commission will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statutes create and to which the appellants, upon facts found or admitted by these administrative officers, are entitled[18]. The agency action of appellee, the administrative construction embodied in the regulations, and the administrative decision of the Civil Service Commission approving such action, alike turned on a pure question of law, in respect of which appellee and the Commission misconstrued the law. The administrative determination of that question is subject to judicial review in the present suits and should have been considered and decided by the court below[18].

Moreover, the right to such review is now prescribed, and the jurisdiction of the District Court expressly sustained by § 10 of the Administrative Procedure Act of June 11, 1946. § 10, 60 Stat. 243, 5 U. S. C. § 1009.[19]

These suits for violation of the legal rights of appellants under the applicable statutes may be maintained against appellee without joining the Civil Service Commission which promulgated the regulations pursuant to which appellee assumed to act[20]. Adequate relief may be afforded by "an adaptation of court procedure to a remolding of the situation as nearly as may be to what it should have been initially."[21]

The "administrative remedy" was inapplicable.

The so-called administrative remedy of appeal to the Civil Service Commission under § 14 of the 1944 Act, which appellants pursued and exhausted (R. 55), was never legally applicable in respect of the agency action complained of

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[19] *Snyder* v. *Buck*, 75 F. Supp. 902, 907-908 (D. C., D. C., 1948); and see *Ma-King Products Co.* v. *Blair*, 271 U. S. 479, 483; *Pope* v. *United States*, 323 U. S. 1, 14.

[20] *Williams* v. *Fanning*, 332 U. S. 490, 493-494; *Colorado* v. *Toll*, 268 U. S. 228, 230.

[21] *Addison* v. *Holly Fruit Products Co.*, 322 U. S. 607, 620; *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, 17.

herein. The express terms of § 14 make such appeal applicable only in cases of employer agency action involving dismissals, etc., *for cause,* i. e. for delinquency, inefficiency, or misconduct on the part of the individual employee. See pp. 32-33, Brief for Appellants, and cases there cited. The right of appeal to the Commission was thus inapplicable to the instant cases of releases purely in reduction of force, involving no such delinquency, inefficiency, or misconduct.

Moreover, the appeal under § 14 is expressly made applicable only to preference eligibles of *"permanent or indefinite"* tenure of employment, while appellee insists that appellants have no such tenure but were accorded only tenure limited to the duration of the war and six months thereafter (Br. 15-16).

Violation of appellants' rights to classified status.

Appellants have shown in detail the facts and applicable statutes, Executive orders, and regulations whereby rights to probational appointment and classified (permanent) status inured to them as a matter of law (pp. 35-50, Brief for Appellants. (R. 55-57, 17-18). The Brief for Appellee ignores the case of denial and violation thus made out and confines itself to naked reassertions (Br. 1, 5-6) to the effect that appellee was required to make and did make limited war-service appointments pursuant to the same regulations which appellants have already analyzed and shown to be wholly inapplicable to the Attorney positions involved herein.

The attention of the Court is further invited to the testimony on April 17, 1944 of Robert H. Shields, Solicitor of the Department of Agriculture for the years 1940-1946, the officer who employed appellants in 1943 and under whose supervision they served for several years as Attorneys, Grade P-3. Mr. Shields' testimony is published at pages 79-85 of the official printed transcript of Hearings before the Subcommittee of the Committee on Appropriations of

the United States Senate on the Agricultural Appropriation Bill for 1945. At page 85 appears the following:

> *Senator Chavez.* You get all your personnel through civil service?
>
> *Mr. Shields.* Through the Civil Service Commission, the legal examining section of it. Every position in the office [of the Solicitor] is classified civil service except the position of Solicitor. I, along with some others, recommended that the Solicitor should not be covered under the Ramspeck Act. I think that the Secretary ought to be able to pick his own lawyer. So that is the only job that is not a civil service job."

Attorney positions still remain in classified civil service.

This testimony serves to spotlight the anomalous situation which existed and apparently still exists with respect to the Attorney positions occupied by appellants during and after Mr. Shields' administration of the Office of the Solicitor. By the precise terms of the "Ramspeck" Act "the President is authorized by Executive order to cover into the classified civil service" such Attorney positions, among others. [Act of November 26, 1940, c. 919, § 1, 54 Stat. 1211, 5 U. S. C. § 631 (a).] Expressly pursuant to the above statute, this explicit and specific authority only "to *cover*" was duly exercised by the President under Executive Order No. 8743 of April 23, 1941 (6 Fed. Reg. 2117); and by such exercise *the authority given by the statute was plainly exhausted.* We are not at liberty to assume that Congress, having by apt words explicitly granted only the authority to "*cover*", intended to grant the further, contrary, and repugnant authority to "*uncover*" such positions from the classified civil service, either upon a single occasion or repeatedly at the will of the executive[22]. It would thus appear that such Attorney positions have legally remained in the classified civil service into which they were

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22 *United States* v. *First National Bank of Detroit*, 234 U. S. 245, 262; *United States* v. *Hartwell*, 6 Wall. 385, 386; and cases under footnote 6 *supra.*

originally "covered" pursuant to the precisely designated and defined Congressional authorization to "*cover*"—that and no more. The several implications of this situation in respect of various aspects of the present suits require no addition to the extensive treatment already submitted.

Appellants' rights as war-time veterans specifically preserved.

As stated by the Senate Committee on Civil Service, § 18 of the 1944 Act "contains a saving clause for the protection of existing rights under present laws, Executive orders, rules and regulations." S. Rept. No. 907, 78th Cong., 2d Sess., p. 4. § 18 of the 1944 Act reads:

> "All Acts and parts of Acts inconsistent with the provisions hereof are hereby modified to conform herewith, *and this chapter shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof.*" [Emphasis added]

The protection of this saving clause applies with precision to each of these appellants.[23] Each received an honorable discharge from the United States Army—Elder on December 9, 1918; Furman on May 5, 1942—and since these respective dates each has been an honorably discharged soldier as well as an ex-serviceman who served in the Infantry branch of the armed forces of the United States during World War One and World War Two respectively, and each was separated therefrom under honorable conditions (R. 3, 77, 50). From August 1, 1943 to June 6, 1947—almost four years—each of the appellants was employed on active duty in a civilian position in the United States Department of Agriculture at Washington, D. C., with departmental efficiency ratings of "good" or better (R. 50, 3, 77).

These undisputed allegations, without more, establish:

(1) that each of the appellants has been a veterans' preference eligible and preference employee since a definite date long prior to the enactment on June 27, 1944 of the Veterans' Preference Act of 1944; (2) that the long standing absolute retention preference rights given by the 1912 provision and embodied in the 1944 Act,[1] Id. 336-339, were granted to and have been possessed by appellants since such definite dates and have been protected and preserved for each of them under the saving clause in § 18 of the 1944 Act[23, 24].

Amicus Curiae argues[25] that other comments in the committee reports must be taken to mean that the saving clause of § 18 "was intended *merely* to protect the preference of *peace*-time veterans" and that Congress, despite the plain language of § 18, must be deemed to have intended to exclude from such protection all *war*-time veterans such as these appellants. The actual committee comments do not support any such pinched and repugnant construction[26]. Moreover, such a construction would be incompatible with the authoritatively established determinations of the Supreme Court: that the purpose of Congress in passing the 1944 Act was not to take away but to strengthen and broaden—"precisely the opposite" from narrow—the veterans' preferences then embodied in statutes and executive orders, and that any interpretation or holding is prohibited which "would mean that passage of the Veterans' Preference Act in 1944 narrowed the long-existing scope of veterans' preferences in case of reduction in force of government personnel.[1] Id. 337-339. Such construction would also be contrary to the natural import of the unambiguous terms of § 18 of the 1944 Act and inadmissible upon all the grounds

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23 *Mitchell* v. *Cohen*, 333 U. S. 411, 423.

24 *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 83; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 162.

25 Brief for Natl. Assn. of Federal Career Employees, as *Amicus Curiae*.

26 H. Rept. No. 1289, 78th Cong., 2d Sess., p. 3; S. Rept. No. 907, 78th Cong., 2d Sess., p. 2.

stated.[24] In the *Knickerbocker Ice Co.* case the Supreme Court said:

> "The usual function of a saving clause is to preserve something from immediate interference—not to create ambiguity; and the rule is that expression by the legislature of an erroneous opinion concerning the law does not alter it."[24]

And in the *Shreveport* case the Supreme Court said:

> "In proper cases such reports [of committees of the Congress] are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms (cit. cases). Like other extrinsic aids to construction, their use is 'to *solve,* but not to *create* an ambiguity' (cit. cases). Or, as stated in *United States* v. *Hartwell,* 6 Wall. 385, 386, 'If the language is clear it is conclusive. There can be no construction when there is nothing to construe'."

There is nothing ambiguous about the saving clause in § 18 of the 1944 Act. A construction that the manifestly general protection given by the natural import of the terms of this saving clause in § 18 shall be accorded with open arms to *peace*-time military personnel—and at the same time snatched away from *war*-time veterans—is also peculiarly repugnant to the entire spirit, intent, and policy of the Congress "since the beginning of the Republic to extend certain benefits to those who have risked their lives in the armed forces during wartime."[27]

In a marked degree, therefore, the instant case is one for the often expressed consideration, aiding interpretation, that if a given construction was intended—viz. that *war*-time veterans are to be excluded from such protection—

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[27] H. Rept. No. 1289, 78th Cong., 2d Sess., p. 2; 30 Cong. Record, p. 3502, 78th Cong., March 27, 1944.

it would have been easy for the Congress to have expressed it in apt terms.[22]

The foregoing considerations likewise negative the argument of *Amicus Curiae* that § 4 of the Act of 1912 "was superseded by the comprehensive provisions of the Veterans' Preference Act of 1944, under § 18 of that Act."

Civil service tenure plays no part in veterans' retention preference under the 1912 Act.

Amicus Curiae argues that: "Section 4, to which the [1912] proviso was attached, concerned *civil service tenure* in the District of Columbia. The proviso obviously partakes of that purpose and is limited by the context to employees with such *civil service status.*" This is a warped duplication of appellee's argument discussed *supra* and is subject to the same considerations.

Moreover, it should be noted that the only actual provision concerning civil service tenure or status was contained not in § 4 but in § 5—or rather contained in a rider abortively designated as "Section 5" which finally failed of passage. "Section 5" provided that civil service tenure be limited to five years, later amended to seven years. Both § 4 and "Section 5" were introduced as riders to the Legislative, Executive, and Judicial Appropriation Act for the fiscal year 1913, and to each section was later appended on the floor the same veterans' preference proviso as a rider appended to a rider. During the subsequent legislative proceedings this unhatched "Section 5", both with and without the veterans' proviso appended thereto, was repeatedly repudiated and was finally dropped altogether, while § 4, with the same veterans' proviso appended, was in due course included in the omnibus Appropriation measure as finally enacted August 23, 1912 (37 Stat. 360, 413). These entire proceedings[28] serve as an illustration of the

[28] The "1912 proviso" was a rider appended to a rider inserted in the Annual Legislative, Executive, and Judicial Appropriation Act for the fiscal year 1913, finally enacted August 23, 1912. The House Committee on Appro-

futility and general unsoundness of "constructing" a Congressional "intention" upon such fortuitous maneuvers where, as here, the circumstances warrant no more than an inference of Congressional *indifference* to the context into which an independent and substantive provision is engrafted as a parasitic rider for the sole purpose of getting it passed.[7] The opinion in *Chesapeake & Potomac Tel. Co.* v. *Manning, supra,* describes an analogous set of legislative maneuvers.

It is not without significance that neither the *1876* proviso—giving an absolute retention preference to veterans "equally qualified"—nor the § 3 in which it is found, nor the omnibus Appropriation Act of which it forms a part, contains any mention of the classified civil service or of classified (permanent) tenure of employment or any words even remotely suggesting that the veterans' preference given under § 3 might be intended by Congress to be confined to positions in the classified civil service or to veterans having classified (permanent) tenure of employment. The 1876 Act has also been construed by the Supreme Court together with the 1912 and 1944 Acts as forming one act.[1] Id. 336.

Except as between veterans themselves, civil service tenure of employment plays no conceivable part in the determination of relative retention preference.[1] Id. 335-336.

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priations recommended "Section 5" of the bill (H. R. 24023) which provided for limitation of civil service tenure to five years, without any veterans' preference proviso. H. Rept. No. 633, 62d Cong., 2d Sess., p. 14. A veterans' preference proviso was added on the floor of the House. 48 Cong. Rec., p. 6191. The Senate Committee on Appropriations struck out "Section 5", including the appended proviso, and inserted a new Section 4 establishing a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia, also without any veterans' preference proviso. S. Rept. No. 832, 62d Cong., 2d Sess., p. 7. The Conference Agreement thereafter included both § 4 (as above) and "Section 5" (limiting civil service tenure to 7 years), with an identical veterans' preference proviso attached to each of the two Sections. H. Doc. 910, 62d Cong., 2d Sess., pp. 66-67. In this form the measure was vetoed in toto by the President, because of his objection to "Section 5" and to still another rider abolishing the Commerce Court. Id., pp. 1-4. The measure, as finally passed by both House and Senate and approved by the President, dropped "Section 5" entirely but included § 4 with the veterans' preference proviso appended thereto. The entire § 4, as finally enacted, reads as now incorporated in the Statutes at Large, 37 Stat. 360, 413.

In the case of *Wettre* v. *Hague, supra,*[2] the plaintiffs-appellants were veterans who filed suit to restrain officials of the Naval Shipyard at Boston from demoting them from civilian positions. The lower court dismissed the suit on jurisdictional grounds but said that § 4 of the 1912 Act was "plainly irrelevant to the facts they allege" since it "provides for the establishment of a system of efficiency ratings only 'for the classified service in the several executive departments in the District of Columbia' " and "There is and could be no showing (1) that plaintiffs are in the classified service or (2) that their employment is in the District of Columbia." *Wettre* v. *Hague,* 74 F. Supp. 396, 398. (D. C., D. Mass.). On appeal the Circuit Court of Appeals said *inter alia:*[2]

> "The complaint as we read it alleges only that the plaintiffs, being veterans with a rating of 'good', are about to be demoted from given supervisory positions while non-veterans, presumably with greater seniority, are being retained in those positions. Since this clearly alleges a violation of the plaintiffs' legal rights under the applicable statute as it is now construed, * * * in view of the decision in the *Hilton* case, the judgment appealed from must be set aside * *".

The appellate court in *Wettre* v. *Hague* distinctly followed the settled principles discussed *supra:* (a) it segregated and interpreted the single sentence of the 1912 proviso as the independent and substantive provision under which Congress granted the absolute retention preference right of veterans invoked by the plaintiffs,[1,7] (b) pointed out "only" the facts necessary to establish the plaintiffs' legal rights under such applicable statute and the defendants' violation thereof; and (c) discarded as irrelevant all other facts in the record—for instance, that the civilian positions occupied by plaintiffs were not in any executive department in the District of Columbia, that their positions were in the *unclassified* civil service, and that the veteran plaintiffs, as well as the nonveteran nonpreference em-

ployees being retained, all enjoyed a classified (permanent) status or tenure of employment previously acquired. Such results in this Boston Shipyard case clearly rest upon the rules of law discussed *supra,* which establish that the present scope of the absolute retention preference of veterans is coextensive with the scope originally defined in the independent and substantive provision set out in the single unambiguous sentence of the "1912 provision" as *broadened*, but in no respect narrowed, by §§ 2, 12, and 18 of the Veterans' Preference Act of 1944.[1] Id. 336-339.[2]

CONCLUSION.

For the foregoing reasons, the judgments below should be set aside and the causes remanded to the District Court with direction for such further proceedings and relief as this Court may deem just and proper.

Respectfully submitted,

C. L. Dawson,
917 - 15th St., N. W.,
Washington 5, D. C.,
Attorney for Appellants.

Robert D. Elder,
4233 - 32nd Road South,
Arlington, Virginia,
Attorney pro se.

May, 1949.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

No. 10007

FILED JUN 30 1950

Joseph W. Stewart
CLERK

ROBERT D. ELDER, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

No. 10008

GREENE CHANDLER FURMAN, APPELLANT

v.

CHARLES F. BRANNAN, SECRETARY OF AGRICULTURE, APPELLEE

PETITION FOR REHEARING

Comes now the appellee and respectfully petitions this honorable Court that it grant a rehearing in each of the above-entitled cases and in support of said petition respectfully shows and alleges:

1. In its opinion in these cases, this Court held that appellants' amended and supplemental complaints alleged violations of appellants' preference as veterans to reemployment in the Office of the Solicitor of the Department of Agriculture. This preference to reemployment the Court found to be given by Section 2 of the Veterans Preference Act of 1944.[1] So construed, the section is said to give appellants, as veterans, a preference to reemployment that is identical to the preference to retention in the service set forth in Section 12 of the statute.[2]

[1] 5 U. S. C. Sec. 851.
[2] 5 U. S. C. Sec. 861.

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Prior to the decision of this Court the pleadings in these cases had never been considered to present the issue of appellants' reemployment rights or preferences. Neither in the court below nor in this Court did the parties argue or brief this question. The sole contention urged by appellants throughout the litigation of these cases related to the alleged violation of their rights to retention in the positions from which they were respectively separated in a reduction in force on June 30, 1947.

We respectfully suggest that the Court's construction of Section 2 of the Veterans Preference Act of 1944 is not in harmony with the other provisions of that statute and the regulations of the Civil Service Commission issued pursuant thereto.[3] Section 2 of the statute merely states that "a preference" shall be extended to veterans and proceeds to enumerate the situations in which the preference will be given and the classes of veterans who will be entitled to it. The remaining sections of the statute define the preference provided for the various situations enumerated in Section 2.

Thus, as this Court held, appellants' preference to retention is defined by Section 12 of the Act, and not by Section 2. In Sections 15, 7, 8, and 9[4] the Act provides in detail for a preference to veterans for reemployment which is not the same or the equivalent of the preference to retention in employment which is granted by the provisions of Section 12 of the statute.

In *Hilton* v. *Forrestal,* 165 F. (2d) 251, aff'd. 334 U. S. 323, this Court held valid Civil Service Commission regulations under Section 12 of the statute by which veterans are given an absolute preference for retention over competing nonveterans within the classification established by the regulations. In general, the preference to reemployment conferred by Sections 15, 7, 8, and 9 of the Act requires only that veteran applicants be rated individually with competing nonveterans, veteran status being assigned a numerical value. Appellants' pleadings fail to allege a violation of this preference and appellants are in fact unable to make such allegations since ap-

[3] 5 C. F. R. 1947 Supp., Sec. 21.6 (b).

[4] 5 U. S. C. Secs. 856, 857, 858, 864.

pellee fully accorded them the preference established by these sections of the statute and regulations. (Affidavit of Bawcombe, J. A. 69–72.)

Appellee does not believe that this Court contemplated a construction of the statute which does violence to its plain terms, or that it intended to invalidate clearly reasonable regulations of the Civil Service Commission, all without briefing or argument by the parties and without discussion or mention in its opinion. This, however, is the effect of the Court's ruling in these cases.

2. If the Court is of the view that the record is not sufficiently clear as to this question, however, and if a rehearing is not desired, it is respectfully requested that the Court modify its opinion to direct the receipt of proof by the lower court on the issue of appellee's compliance with the provisions of Sections 15, 7, 8, and 9 of the Veterans Preference Act of 1944 and the applicable regulations of the Civil Service Commission, and that the Court's mandate be shaped accordingly.

Respectfully submitted.

NEWELL A. CLAPP,
Acting Assistant Attorney General.
GEORGE MORRIS FAY,
United States Attorney.
EDWARD H. HICKEY,
Attorney, Department of Justice.

Of Counsel:
EUGENE T. MAHER,
Attorney, Department of Justice.

CERTIFICATE

Edward H. Hickey, attorney for appellee, hereby certifies that this petition for rehearing is presented in good faith and not for purposes of delay.

EDWARD H. HICKEY,
Attorney, Department of Justice,
Attorney for Appellee.

Certificate of Service

I hereby certify this 30th day of June, 1950, that I have sent a copy of appellee's foregoing petition for rehearing to counsel for appellants, Claude L. Dawson, Esq., at his address, 917 15th Street, NW., Washington, D. C., by official United States mail.

Edward H. Hickey,
Attorney for Appellee.

U. S. GOVERNMENT PRINTING OFFICE: 1950

BRIEF FOR AMICUS CURIAE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10007

ROBERT D. ELDER, *Appellant*

v.

CHARLES F. BRANNAN, Secretary of Agriculture, *Appellee*

No. 10008

GREENE CHANDLER FURMAN, *Appellant*

v.

CHARLES F. BRANNAN, Secretary of Agriculture, *Appellee*

On Appeal From the District Court of the United States for the District of Columbia

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NATIONAL ASSOCIATION OF FEDERAL CAREER EMPLOYEES, AS AMICUS CURIAE

United States Court of Appeals
For the
District of Columbia Circuit
FILED MAR 2 1950
Joseph W. Stewart
CLERK

CHARLES FAHY,
PHILIP LEVY,
1625 K St., N. W.
Washington 6, D. C.
Attorneys for National Association of Federal Career Employees.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

United States Court of Appeals

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No. 10007

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CHARLES F. BRANNAN, Secretary of Agriculture, *Appellee*

On Appeal From the District Court of the United States for the District of Columbia

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MOTION BY THE NATIONAL ASSOCIATION OF FEDERAL CAREER EMPLOYEES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

The National Association of Federal Career Employees respectfully shows this Court as follows:

1. The Association is an organization of Federal employees with civil service status, organized in nine chapters throughout the United States. Its purpose is to advance and protect the civilian career service under the Government of the United States.

2. The matters at issue on this appeal vitally affect the welfare, interests and rights of the Association's membership, and of Federal civil service employees generally. The issues are more fully set forth in the annexed brief proposed to be filed as *amicus curiae*.

3. Consent to the filing of this brief *amicus curiae* was granted by counsel for the appellees, H. G. Morison, Assistant Attorney General of the United States, by letter dated January 17, 1949. Counsel for the appellants has withheld consent.

WHEREFORE, pursuant to Rule 18(i) of the rules of this Honorable Court, it is respectfully moved that leave be granted to the National Association of Federal Career Employees to enter its appearance in this cause by its attorney Charles Fahy, for the purpose of filing *amicus curiae* the brief hereto annexed.

Dated this day of February 1949.

CHARLES FAHY,
1625 K Street, N.W.,
Washington 6, D. C.,
Attorney for National Association of Federal Career Employees.

BRIEF FOR THE NATIONAL ASSOCIATION OF FEDERAL CAREER EMPLOYEES, AS AMICUS CURIAE

STATEMENT

The National Association of Federal Career Employees is an organization of Federal employees with civil service status, organized in nine chapters as follows: New York, N. Y., Naval Shipyard; Philadelphia, Pa., Naval Shipyard; Boston, Mass., Naval Shipyard; Portsmouth, N. H., Naval Shipyard; Norfolk, Va., Naval Shipyard; Charleston, S. C., Naval Shipyard; New Orleans, La., Army Engineers; Monmouth, N. J., Army Engineers; and New York, N. Y., Veterans Administration. The organization is dedicated to the advancement of civilian career service under the Government of the United States, and the protection of the national investment in the experience, qualifications and loyal service of such career employees.

This brief *amicus curiae* is submitted in support of the position taken by the Government of the United States, by Charles F. Brannan, Secretary of Agriculture, the appellee herein.

ARGUMENT

Appellants assert (Br. pp. 14-15) "an absolute right not to be discharged or dropped or reduced in rank or salary, in the event of any reduction in force, that is mandatory upon this defendant without regard to either tenure of employment and/or length of service". Specifically, appellants, who hold only war-service status in Federal employment, and consequently fall in sub-group B-1 for purposes of reduction-in-force, demand that they be retained

in preference to non-veterans with civil service status who fall in sub-group A-1 under existing regulations.[1]

The insuperable obstacle to appellants' case is that they do not possess the classified civil service status of the non-veterans they seek to displace. The retention preference demanded is admittedly contrary to existing regulations under the Veterans' Preference Act of 1944. The preference sought can only be sustained by reference to a statutory mandate. See *Hilton* v. *Sullivan,* 334 U. S. 323, 332. None of the statutes cited by appellants will support the extraordinary special privilege sought in these appeals.

I

Veterans' Preference Act of 1944

Section 12 of the Veterans' Preference Act of 1944 requires that "competing employees" in any reduction in force shall be released in accordance with Civil Service Commission regulations which "shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings". The second proviso, which is particularly relied upon, likewise provides that preference employees (i.e. veterans) with efficiency ratings of good or better, "shall be retained in preference to all other *competing* employees"; and veterans whose efficiency rat-

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[1] The distinction was briefly stated by the Attorney General as follows: "War Service appointees are appointed under the War Service Regulations issued by the Civil Service Commission pursuant to Executive Order No. 9063 of February 16, 1942 (7 F. R. 1075). By the terms of these regulations, and of the Executive order under which they were issued, such appointments do not confer a classified civil service status and are limited to a period not to exceed 'the present war and for 6 months thereafter.' Such appointments are known as 'War Service appointments.'" *40 Op. Atty. Gen. No. 66,* May 26, 1943.

War service appointees, appointed for the duration of the war, are deemed to hold "temporary positions" within Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 885, 890, 50 U. S. C. App. §308; and therefore were not entitled to mandatory restoration to duty after return from military service under the provisions of that Act. See 40 Op. Atty. Gen. No. 66, May 26, 1943. The "administrative restoration" authorized by Civil Service regulations in no case permitted veterans to displace non-veterans in a higher category of tenure. *Civil Service Act, Rules and Regulations Annotated, amended to October 31, 1943* (U. S. Civil Service Com'n.) p. 41; *Federal Personnel Manual* (U. S. Civil Service Com'n.) R6-2; Z1-253. Even these administrative regulations have since been withdrawn by the Civil Service Commission. See Release December 19, 1948.

ing is below good are required to be retained "in preference to *competing* non-preference employees" with equal or lesser efficiency ratings.

Throughout the history of veteran's preference in Federal employment, whether by specific statute or duly authorized Executive order, the veteran's preference has been enforced in favor of the veteran and against the non-veteran only in the same category of tenure of employment.[2] It has never before been asserted that veterans with what amounts to temporary tenure are preferred over non-veterans with civil service tenure.

The case of *Hilton* v. *Sullivan,* 334 U. S. 323, upheld the validity of Sub-group A-1 Plus and Sub-group A-1 of the reduction-in-force regulations promulgated by the Civil Service Commission under Section 12 of the Act of 1944. Those categories embraced *only veterans with civil service tenure,* who were preferred over non-veterans (in Sub-group A-2) likewise with civil service tenure, regardless of length of service. This classification by tenure of employment was upheld by this court, on the ground that it was not "an unreasonable method of applying the wholly general directives of the statute". 165 F. 2d 251, 253. On appeal, the Supreme Court of the United States not only sustained this classification of the Commission's regulations, but flatly ruled that it was the only means for carrying out the statutory requirements. 334 U. S. 323, 336. This opinion by the Supreme Court of the United States thus supports the contention of the Government herein and repudiates the argument of the appellants. The scope of

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[2] Exec. Order 3567, October 24, 1921; Exec. Order 3801, March 3, 1923; Exec. Order 4240, June 4, 1925; Exec. Order 5068, March 2, 1929; 34 Op. Atty. Gen. 159 (1924); 38 Op. Atty. Gen. 79 (1934); Civil Service Rule XII(5), in *Civil Service Act, Rules and Regulations Annotated,* amended to October 31, 1943 (U. S. Civil Service Com'n.) p. 185; War Service Regulation XII, *id.,* p. 41. Thus, the reduction-in-force regulations applicable during the war, including the period immediately prior to enactment of the Veterans' Preference Act of 1944, provided for reduction according to categories of tenure, the civil service category being highest. *Id.,* p. 187. Civil Service Rule XII(5) [Executive Order March 2, 1929], which was not superseded by any war-service regulation, continued to grant veterans' preference limited to the classified civil service covered thereby. *Id.,* pp. 185-186.

the Supreme Court opinion in this respect is plainly expressed by its reference to the 1943 regulations of the Civil Service Commission along the same lines:

> "And at the time of passage of the Veterans' Preference Act of 1944, there were 1943 Civil Service Regulations outstanding[10] which granted veterans with permanent tenure and with a rating of 'good' or higher, precisely the same absolute retention preference over non-veterans which is now afforded by Subgroup A-1, here attacked as invalid.

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[10] 5 Code Fed. Reg. (Supp. 143) §§ 12.301-12.313. These regulations, like those attacked here, separated all civil service employees into different categories according to their tenure, with permanent employees having the highest retention status. *Thus all permanent employees, regardless of veteran's preference and of efficiency rating, enjoyed priority over all employees with limited tenures".* 334 U. S. 323, 337. [Italics supplied.]

The case of *Wettre* v. *Hague,* 168 F. 2d 825 (C. C. A. 1st), also relied upon by appellants, is likewise not in point. It concerned demotions rather than layoffs, and both veterans and non-veterans there involved had civil service status.

II

Section 4 of the Act of August 23, 1912

Nothing in the foregoing is modified by Section 4 of the Act of August 23, 1912, 37 Stat. 413, 5 U. S. C. A. §648.

1. The 1912 proviso was adopted as part of a rider on the annual Legislative, Executive and Judicial Appropriation Act for the fiscal year 1913. Section 4, to which the proviso was attached, concerned civil service tenure in the District of Columbia. *Hilton* v. *Sullivan,* 334 U. S. 323, 336, n. 6; *infra,* p. 7, n. 3. The proviso partakes of that purpose and is limited by the context to employees with such civil service status. *United States* v. *McClure,* 305 U. S. 472, 478; *United*

States v. *Morrow*, 266 U. S. 531, 535; *Cox* v. *Hart*, 260 U. S. 427, 435.[3] By executive action, veterans' preference has been extended in various particulars, but in no event has either Congress or the Executive granted to a veteran any preference over a non-veteran in a higher category of tenure.[4] Appellants are not free to take the above quoted proviso out of its context and give it a meaning contrary to the consistent application of veterans' preference in Federal employment over many years.

2. Assuming arguendo that Section 4 of the Act of 1912 is given the meaning contended for by appellants, that Sec-

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[3] The House Committee on Appropriations recommended Section 5 of the bill (H. R. 24023), limiting civil service tenure to five years and containing no veterans' proviso. H. Rep. No. 633, 62d Cong. 2d Sess., p. 14. The veterans' proviso was added on the floor of the House. 48 Cong. Rec. 6191. The Senate Committee on Appropriations struck out Section 5, including the proviso, and inserted a new Section 4 establishing a system of efficiency ratings for civil service employees in the District of Columbia, without the veterans' proviso. S. Rep. No. 832, 62d Cong. 2d Sess., p. 7. The Conference Agreement included both Sections 4 and 5 (limiting tenure to 7 years), with the veterans' proviso attached to each Section. H. Doc. 910, 62d Cong. 2d Sess., pp. 66-67. In this form the measure was vetoed in toto by the President, because of his objection to the 7-year clause of Section 5 and to another rider abolishing the Commerce Court. *Id.*, pp. 1-4. The measure as finally adopted and approved dropped Section 5 and retained the preference proviso as a limitation on Section 4. The entire Section 4, as enacted, read as follows:

"The Civil Service Commission shall, subject to the approval of the President, establish a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia based upon records kept in each department and independent establishment with such frequency as to make them as nearly as possible records of fact. Such system shall provide a minimum rating of efficiency which must be attained by an employee before he may be promoted; it shall also provide a rating below which no employee may fall without being demoted; it shall further provide for a rating below which no employee may fall without being dismissed for inefficiency. All promotions, demotions and dismissals shall be governed by provisions of the civil service rules. Copies of all records of efficiency shall be furnished by the departments and independent establishments to the Civil Service Commission for record in accordance with the provisions of this section: *Provided*, That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary.

"Any person knowingly violating the provisions of this section shall be summarily removed from office, and may also upon conviction thereof be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year"

[4] See 38 *Op. Atty. Gen.* 79: "The order of March 3, 1923, extended the military preference provision to the entire 'classified service', which is defined by Civil Service Rule II as comprehending 'all officers and employees in the executive civil service of the U. S.' save persons and positions excepted by law or valid regulation, and includes 'the classified employees of the several executive departments outside of Washington'." (p. 82).

tion was superseded by the comprehensive provisions of the Veterans' Preference Act of 1944, under Section 18 of that Act. H. Rep. 1289, 78th Cong. 2d Sess., p. 7. The final saving clause of Section 18 was intended merely to protect the preference of peace-time veterans who were in Government employment and on civil service registers when the Act of 1944 was passed, and who otherwise would be excluded by its terms. See S. Rep. No. 907, 78th Cong. 2d Sess., p. 2; H. Rep. No. 1289, 78th Cong. 2d Sess., p. 3; see *Mitchell* v. *Cohen,* 333 U. S. 411, 423; testimony of Civil Service Commissioner Flemming, in *Hearings on S. 1762 and H. R. 4115,* Committee on Civil Service, U. S. Senate, 78th Cong. 2d Sess., p. 50.

III

Section 6 of the Act of August 24, 1912 and Section 14 of the Veterans' Preference Act of 1944

Finally, appellants rely on statutory provisions barring separations from Federal employment "except to promote the efficiency of the service". These statutes have no application.

1. Section 6 of the Act of August 24, 1912, as amended (37 Stat. 555, 5 U. S. C. §652), contains the general ban against removing any "person in the classified civil service of the United States except for such cause as will promote the efficiency of said service . . ." This provision applies only to the classified civil service, from which appellants are excluded. Moreover, even as applied to those with civil service tenure, this provision relates to discharge "for cause", and does not protect against separation in *bona fide* reductions-in-force pursuant to reduction-in-force regulations. *Longfellow* v. *Gudger,* 16 F. 2d 653 (App. D. C.); *Persing* v. *Daniels,* 43 App. D. C. 470; *Civil Service Act, Rules and Regulations Annotated,* amended to October 31, 1943 (U. S. Civil Service Com'n), p. 185; *Federal Personnel Manual* (U. S. Civil Service Com'n.) S1-6, R3.

2. Section 14 of the Act of 1944, also relied upon, provides that "no permanent or indefinite preference eligible . . . shall be discharged . . . except for such cause as will promote the efficiency of the service and for reasons given in writing . . .". This section provides a special statutory procedure on notice and hearing in such instances. This provision, like the general provision in Section 6 of the Act of 1912 above cited, does not appear to be applicable to war service employees, although appellants were in fact notified and given appropriate hearings under Section 14. In any event, Section 14 applies only to action "for cause"; it does not apply to reductions-in-force carried out under applicable regulations pursuant to Section 12 of the Veterans' Preference Act of 1944. *Federal Personnel Manual* (U. S. Civil Service Com'n.) Z1-302, §22.1(a)(3).

CONCLUSION

For the foregoing reasons, the judgments below should be affirmed and the appeals dismissed.

Respectfully submitted,

CHARLES FAHY,
PHILIP LEVY,
1625 K St., N. W.
Washington 6, D. C.
Attorneys for National Association of Federal Career Employees.

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